No. 91-1160

Supreme Court, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

THOMAS E. CREECH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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the State of Idaho

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Petition For Certiorari Filed January 14, 1992
Certiorari Granted June 15, 1992

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GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Filed: 7/21/86

Court of Appeals Docket #: 86 3983
Nsuit: 3530 Habeas corpus (Fed)
Creech v. Arave, et al., ct al
Appeal from: District of Idaho (Boise)

Case type information:
1) civil
2) private
3) habeas corpus

Lower court information:

District: 0976-1: CV-86-1042-HLR
presiding judge: Harold L. Ryan, District Judge
Date Filed: 1/31/86
Date order/judgment: 6/17/86
Date NOA filed: 7/9/86

Fee status: in forma pauperis

Prior cases:
None
Current cases:
None

THOMAS E. CREECH Petitioner - Appellant	Rolf M. Kehne, Esq. (208) 342-2272 [COR LD NTC cja] 1208 W. State Street Boise, ID 83702

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v.

A. J. ARAVE, Warden, Idaho State Penitentiary
Respondent - Appellee

Lynn E. Thomas, Solicitor General
208-334-2400
[COR LD NTC dag]
Idaho Department of Finance
700 West State Street
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Jim Jones, Attorney General
[COR LD NTC ag]
ATTORNEY GENERAL, STATE OF IDAHO
Natural Resources Division
Statehouse, Rm. 210
Boise, ID 83720
(208) 334-2400

Frederick C. Lyon, Clerk
208/334-2210
[NTC]
Supreme Court,
Court of Appeals
Supreme Court Building
451 W. State Street
Boise, ID 83720

AL MURPHY, Director, Idaho State Board of Corrections
Respondent - Appellee

Lynn E. Thomas, Solicitor General
(See above)
[COR LD NTC dag]

Jim Jones, Attorney General
(See above)
[COR LD NTC ag]

JIM JONES, Attorney General, State of Idaho
Respondent - Appellee

Lynne E. Thomas, Solicitor General
(See above)
[COR LD NTC dag]

Jim Jones, Attorney General
(See above)
[COR LD NTC ag]

THOMAS E. CREECH

Petitioner - Appellant

v.

A. J. ARAVE, Warden, Idaho State Penitentiary; AL MURPHY, Director, Idaho State Board of Corrections; JIM JONES, Attorney General, State of Idaho

Respondents - Appellees

7/21/86 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement 7/22/86. (jr)

7/21/86 Filed appellant's (Thomas E. Creech) motion for stay of execution to (CRIMATT); served on 7/18/86 [47355] (jr)

7/21/86 Filed appellees' (Jim Jones, Al Murphy and A. J Arave) emergency motion to vacate certificate of probable cause and to deny stay of

execution to (CRIMATT); served on 7/18/86. [47356] [86-3903] (jr)

7/22/86 Received as of 7/21/86 copy of District Court order denying appellees' motion to recall certificate of probable cause to (CRIMATT). (jr)

7/23/86 Received District Court order dtd, 7/16 re: denying motion to recall certificate of probable cause. Also rec'd documents pertaining to emergency motion. (CRIMATT). (jw)

7/24/86 Filed order (FARRIS, PREGERSON, WIGGINS,) aplt's motion for a stay of execution pending appeal is granted. Aplees' motion to vacate the DC's certificate of probable cause is denied. [86-3983] (dmf)

8/13/86 Received Aple atty L. Thomas letter dated 8/7/86 re: Aple was not served a copy of Aplt's mtn for stay. (Clk served copy 8/13/86) (vm)

8/27/86 Received as of 08/04/86, copy of Supreme Court order, denying the application of the Solicitor General of Idaho for an order to vacate the stay of execution of sentence of death entered by the U.S. Court of Appeals for the Ninth Circuit. (CRIMATT) [86-3983] (sm)

11/18/86 Filed as of 11/13/86, Appellee Jim Jones, Appellee Al Murphy, Appellee A. J. Arave's motion to dismiss the case. [86-3983]; served on 11/10/86. [76596] (Crimatt) (vm)

12/2/86 Filed order (FARRIS,) Aplt's counsel will show cause in writing within 14 days hereof why he should not be disciplined for failure to comply with the rules, and why the

appeal should not be dismissed for failure to prosecute. [86-3983] (dmf)

1/8/87 Received as of 12/30/86 Rolf M. Kehne's original response to order to show cause filed 12/2/86 no copies and no service on opposing counsel; counsel notified. [86-3983] (jr)

1/12/87 Filed Appellant Thomas E. Creech's response to order to show cause 1/8/87 (CRIMATT) [86-3983] (dmf)

2/2/87 Received copy of transcript designation and ordering form filed in DC (sent to case file) (sm)

3/9/87 Filed certificate of record on appeal RT filed in DC 03/05/87 appellant's opening brief due 4/20/87 for Thomas E. Creech [86-3983] (sm)

3/9/87 Sent letter to Appellee Jim Jones, Appellee Al Murphy, Appellee A. J. Arave, Appellant Thomas E. Creech setting briefing schedule: setting schedule as follows: appellant's brief, excerpt and designation are due on 4/20/87 for Thomas E. Creech [86-3983] (sm)

3/11/87 Filed order (GOODWIN and SCHROEDER) The motion to dismiss is denied. Rolf M. Kehne, Esq., is reprimanded for his lack of dilligence and admonished that any future failure to comply with the rules of this court may result in dismissal of the appeal and imposition of sanctions. [76596-1] [86-3983] (sm)

3/24/87 FILED, AS OF 3/9/87, CERTIFIED TRANSCRIPT OF RECORD ON APPEAL IN ONE

VOLUME OF REPORTER'S TRANSCRIPTS (ORIGINAL). [86-3983] [86-3983] (jr)

3/24/87 Filed as of 3/20/87 certified copy of district court docket entries in lieu of record pursuant to Rule 11(e). [86-3983] (jr)

4/20/87 Filed Appellant Thomas E. Creech's motion to extend time to file appellant's opening brief (CRIMATT) [86-3983] served on 4/17/87 [122633] (dmf)

4/20/87 Filed Appellant Thomas E. Creech's motion for appointment of co-counsel. (CRIMATT) [86-3983] served on 4/17/87 [122641] (dmf)

5/11/87 Filed order (FARRIS) The briefing schedule established 03/09/87 is vacated. A new briefing schedule will be established upon disposition of appellant's pending motion for appointment of co-counsel. [86-3983] (sm)

6/22/87 Filed order (ANDERSON and CANBY) Petitioner's motion for appointment of co-counsel is granted. See 18 U.S.C. 3005 and 3006A (9a)(2)(B). Cliff Gardner, Esq., will be appointed by separate order. [122641-1] [86-3983] Appellant's opening brief and excerpt of record are due 07/27/87. Appellees' brief and appellant's reply brief, if any, shall be filed in accordance with the time limits set forth in Fed. R. App. P. 31(a). [86-3983] (sm)

6/22/87 Criminal Justice Act voucher sent (voucher #1404016) to Cliff Gardner for Appellant Thomas E. Creech [86-3983] (sm)

7/27/87 Filed Appellant Thomas E. Creech's motion to extend time to file appellant's opening

brief until 10/15/87 (CRIMATT) [86-3983] served on 7/24/87 [169594] (dmf)

8/13/87 Filed order CRIMATT (dpt) Appellant's motion for an extension of time to file the opening brief is agranted. Appellant's opening brief is due 10/15/87. Appellees' brief and appellant's reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). [169594-1] appellant's opening brief is now due 10/15/87 for Thomas E. Creech. [86-3983] (ah)

10/16/87 Filed as of 10/15/87, Appellant Thomas E. Creech's motion to file oversized brief (CRIMATT) [86-3903]; served on 10/14/87. [208093] (dmf)

10/16/87 Received, as of 10/15/87, Appellant Thomas E. Creech's brief in 15 copies of 94 pages, oversize, motion pending. Served on 10/15/87. [86-3983] (dmf)

11/2/87 Filed order (FARRIS) denying motion to file oversized brief [208093-1] The clerk is ordered to return the opening brief to appeallan, and appellant shall submit an opening brief of no more that 50 pages no later than 11/20/87. Appellees' brief and appellant's reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). [86-3983] (ah)

11/3/87 Hold brief pending motion for reconsideration. [86-3983] (ah)

11/4/87 Filed Appellant Thomas E. Creech's motion to reconsider order of the Court denying appellant's motion to file an oversized brief [86-3983] served on 11/4/87 [215807] (CRIMATT) (sm)

11/13/87 Filed order (ALARCON, NORRIS) Appellant's motion for reconsideration of the court's order denying leave to file an oversized brief is granted. Appellant's opening brief already received is ordered filed. [215807-1] Appellees' brief and appellant's reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). [86-3983] (ah)

11/16/87 Filed as of 11/13/87 original and 15 copies Appellant Thomas E. Creech opening brief, 94 pages, and excerpts of record in 1 volumes, served on 10/15/87 [86-3983] (ah)

12/16/87 Filed appellee's Jim Jones, Al Murphy, A. J. Arave motion to file oversized brief (CRIMATT) [86-3983] served on 12/16/87 [335720] (with copy of brief) (dmf)

12/16/87 Filed appellee's Jim Jones, Al Murphy, A. J. Arave motion to extend time to file appellee's brief (CRIMATT) [86-3983] served on 12/16/87 [335744] (dmf)

12/16/87 Received orig. copies 15 Jim Jones, Al Murphy, A. J. Arave's brief of 59 pages; served on 12/15/87 deficient: oversize, motion pending; 6 copies of excerpts. [86-3983] (dmf)

12/31/87 Filed order (FARRIS) Appellee's motion for leave to file an oversized brief and for an extension of time are granted. The brief already received is ordered filed. Appellant's optional reply brief shall be filed in accordance with the time limits set forth in Fed. R. App. P. 31(a). [335720-1] [335744-1] [86-3983] (sm)

12/31/87 Filed original and 15 copies appellee Jim Jones, Al Murphy, A. J. Arave's 59 pages brief, with excerpts of record in 1 volumes, served on 12/15/87, pursuant to order of 12/31/87. [86-3983] (sm)

1/20/88 Received as of 01/13/88, orig. 15 copies Thomas E. Creech's brief of 25 pages; served on 1/13/88 deficient; Late (notified counsel to file motion) [86-3983] response to brief deficiency notice due 2/3/88 for Thomas E. Creech (sm)

1/22/88 Filed as of 1/21/88, Appellant Thomas E. Creech's motion to extend time to file reply brief (CRIMATT w/copy of brief) [86-3983]; served on 1/21/88 [434172] (dmf)

1/25/88 INVENTORIED [86-3983] (mm)

1/29/88 Filed order (ANDERSON) Appellant's motion for an extension of time to file the reply brief is granted. The reply brief already received is order filed. [434172-1] [86-3983] (sm)

1/29/88 Filed original and 15 copies Thomas E. Creech reply brief, 25 pages, served on 1/13/88, pursuant to order of 01/29/88. [86-3983] (sm)

2/9/88 Calendar Check performed [86-3983] (th)

2/16/88 Calendar materials being prepared. [86-3983] [86-3983] (th)

2/18/88 CALENDARED: SEATTLE APR 6, 1988 9:00 a.m. [86-3983] (aw)

3/29/88 Received as of 3/28/88 appellant's (Thomas E. Creech) letter dated 3/28/88 re: additional authorities; served on 3/28/88 to (panel). [86-3983] (jr)

4/4/88 Received Appellee A. J. Arave, et al, letter dated 4/1/88 re: addl. citations. (PANEL) [86-3983] (dmf)

4/5/88 Filed supplement to certified record on appeal (filed 3/24/87) in 2 Volumes 2 Clerk's Rec 0 RT (orig) [86-3983] (dmf)

4/6/88 ARGUED AND SUBMITTED TO: Robert R. Beezer, Cynthia Melcomb HALL, Charles E. WIGGINS [86-3983] (dmf)

4/7/88 Received aplees' letter dated 4/5/88 re: addl. citations. (PANEL) [86-3983] (dmf)

4/12/88 Received CJA voucher (Voucher #1404016) from counsel for approval of claim. [86-3983] (pn)

5/3/88 CJA voucher (Voucher #1404016) forwarded to panel judge for approval. [86-3983] (pn)

5/27/88 CJA voucher (Voucher #1404016) received from panel judge; approved. (pn)

5/27/88 Sent CJA voucher (Voucher #1404016) to Chief Judge for approval of excess. (pn)

5/27/88 Received CJA voucher (Voucher #1404016) from Chief Judge approving excess claim. (pn)

5/31/88 CJA voucher (Voucher #1404016) sent to Administrative Office with supporting documents. (pn)

7/5/88 Received Appellant Thomas E. Creech letter dated 6/30/88 re: addl. citations. (PANEL) [86-3983] (dmf)

8/25/88 Filed order (BEEZER, HALL & WIGGINS) this case is ordered off submission pending the outcome of our en banc decision in Adamson v. Ricketts, No. 84-2069 (on remand from the Supreme Court). [86-3983] (jr)

10/24/88 Received aplt Thomas E. Creech's additional citations (letter), served on 10/21/88 (PANEL) [86-3983] (dmf)

12/29/88 Received Appellant Thomas E. Creech letter dated 12/28/88 re: informing that the case of Adamson vs. Ricketts, no. 84-2069, as decided on 12/22/88. (PANEL) [86-3983] (dmf)

2/13/89 Received from Clerk, State of Idaho Supreme Court of Appeals letter dated 2/7/89 requesting copies of orders/opinions (except orders re: briefing schedules, etc). [86-3983] (jr)

5/4/89 Received Cliff Gardner for Appellant Thomas E. Creech letter dated 5/2/89 re: change of address. (CASEFILE) [86-3983] (mt)

6/8/89 Received Appellees Jim Jones, et al.'s additional citations, served on 6/5/89. (PANEL) [86-3983] (mt)

6/15/89 Received Thomas E. Creech additional citations, served on 6/13/89. (PANEL) [86-3983] (mt)

6/25/90 Rec'd aplt's letter of additional citations; served on 6/21/90 to (panel). [86-3983] (jr)

7/12/90 Filed order (HALL,); This case is resubmitted effective the date this order is filed. [86-3983] (dmf)

7/12/90 Case resubmitted on this date to BEEZER, HALL, WIGGINS. (See previous deferral of submission.) Per order of 7/12/90. [86-3983] (dmf)

8/3/90 Filed order (BEEZER, HALL, WIGGINS): It is ordered that, within 21 days from the date of this order, petitioner-aplt shall file a suppl. brief addressing the effect on this case by the opinion in Walton v. Arizona and Lewis v. Jeffers. In addition, aplt should discuss any other relevant authority published since 4/6/88, the date of oral argument in this matter. Defendant-aplee shall file a responsive brief within 21 days of the date of aplt's brief. [86-3983] (dmf)

8/27/90 Filed original and 15 copies Appellant Thomas E. Creech supplemental brief of 41 pages, served on 8/24/90 (PANEL). [86-3983] (mt)

9/13/90 Filed A. J. ARAVE, et al motion to extend time to file supplemental brief until 10/12/90 (PANEL) [86-3983] served on 9/11/90 [1812540] (dmf)

9/28/90 Filed order (BEEZER,, HALL,, WIGGINS,): Aple's motion for an extension of time to file its brief is granted. The brief shall be filed no later than 10/12/90. No further requests by aples for extension of time to file will be considered. [1812540-1] [86-3983] (rv)

10/12/90 Filed original and 15 copies Appellee Jim Jones, Appellee Al Murphy, Appellee A. J.

Arave supplemental brief of 10 pages, served on 10/12/90 (PANEL) [86-3983] (dmf)

10/18/90 Filed Appellant Thomas E. Creech's motion for leave to file supplemental reply brief. (PANEL) [86-3983] served on 10/17/90 [1827936] [86-3983] (dmf)

10/18/90 Received original and 15 copies Appellant Thomas E. Creech supplemental brief of 5 pages, served on 10/17/90 deficient: motion to file pending: (PANEL w/motion to file) [86-3983] (dmf)

10/25/90 Received Jim Jones, Al Murphy, A. J. Arave additional citations, served on 10/23/90 (PANEL) [86-3983] (dmf)

11/9/90 Received Thomas E. Creech additional citations, served on 11/7/90 (PANEL) [86-3983] (dmf)

12/10/90 Filed original and 15 copies Appellant Thomas E. Creech supplemental brief of 5 pages, served on 10/17/90 previously rec'd. (PANEL) [86-3983] (jlc)

12/11/90 Filed order (BEEZER, HALL, WIGGINS): appellant's application to permit filing of a supplemental reply brief is hereby granted. [86-3983] (jlc)

3/27/91 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. BEEZER, HALL, author, WIGGINS.) FILED AND ENTERED JUDGMENT. [86-3983] (ck)

4/11/91 [1912597] Filed original and 40 copies Appellee A. J. Arave petition for rehearing with

suggestion for rehearing en banc 14 p. pages, served on 4/10/91. (PANEL & ALL ACTIVE JUDGES) [86-3983] (jlc)

4/11/91 [1912608] Filed original and 40 copies Appellant Thomas E. Creech petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 4/9/91. (PANEL & ALL ACTIVE JUDGES) [86-3983] (jlc)

10/16/91 Filed order and amended opinion (Judges Robert R. BEEZER, Cynthia H. HALL, Charles E. WIGGINS) the opinion filed on 3/27/91 is hereby amended as follows: (see text). With these amendments the petition for rehearing from the aplt and the petition for rehearing from the aples are denied and both suggestions for rehearing en banc are rejected. (Judge Trott dissenting from the order denying rehearing en banc. Kozinski & T.G. Nelson joining.) [86-3983] (jlc)

10/28/91 Filed aples' motion for stay of mandate; affidavit of Lynn E. Thomas. (10/25) (LEAD JUDGE) [86-3983] (jlc)

11/6/91 Received CJA voucher (voucher #suppl#1404016, recap 23,092.50) from counsel (Gardner) for approval of claim. [86-3983] (pn)

11/19/91 CJA voucher (Voucher # suppl#1404016 toall) forwarded to panel judge for approval. [86-3983] (pn)

12/3/91 CJA voucher (Voucher #1404016) received from panel judge; approved. (mlm)

12/4/91 Filed order (Cynthia H. HALL): respondents' motion for stay of mandate filed 10/28/91, is hereby DENIED. [86-3983] (jlc)

12/4/91 MANDATE ISSUED [86-3983] (jlc)

12/9/91 Sent CJA voucher (Voucher #1404016) to Chief Judge (BBF) for approval of excess. (mlm)

12/19/91 Received supplemental CJA voucher (Voucher #1404016) from Chief Judge approving excess claim. (mt)

1/21/92 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 91-1160 filed on 1/14/92. [86-3983] (jlc)

1/24/92 Processed CJA voucher (Voucher #1404016 sup. for $23092.50) for counsel-(Cliff Gardner) [86-3983] (mlm)

2/27/92 Received notice from Supreme Court: cross-petition for certiorari filed Supreme Court No. 91-7348 filed on 2/18/92. [86-3983] (jlc)

4/20/92 Supplemental Criminal Justice Act voucher sent (1404016 Voucher #) to Cliff Gardner for Appellant Thomas E. Creech per atty's request. [86-3983] (rv)

4/30/92 Received Appellant atty Gardner's addendum to supplemental CJA voucher: cert. petition copies. 4/28/92 [86-3983] (mlm)

5/4/92 Supplemental CJA voucher (Voucher #1404016-3 for $15,593.50c to CHH) forwarded to panel judge for approval. [86-3983] (mlm)

7/6/92 Received notice from Supreme Court, petition for certiorari GRANTED on 6/15/92 (SC# 91-1160). (PANEL) (jlc)

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR
THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff,	)	
vs.	)	INFORMATION
THOMAS EUGENE CREECH, Defendant.	)	(Filed June 8, 1981)

JIM C. HARRIS, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of said State, prosecutes in its behalf, in proper person comes now into said District Court of the County of Ada, and gives the Court to understand and be informed that THOMAS EUGENE CREECH (is) ~~are~~ accused by this Information of the crime of MURDER IN THE FIRST DEGREE, Felony, I.C. 18-4001, 18-4003 (c)(e), having been duly brought before a magistrate on the 29th day of May, 1981, and having had his preliminary hearing therein upon said charge(s) by said magistrate thereupon held to answer to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, to said charge(s), which said crime(s) was committed as follows, to-wit:

That the said defendant, THOMAS EUGENE CREECH, on or about the 13th day of May, 1981, in the County of Ada, State of Idaho, while the said defendant, THOMAS EUGENE CREECH, was under a sentence for Murder in the First

Degree and/or while the said THOMAS EUGENE CREECH was incarcerated in a penal institution, to-wit: the Idaho State Correctional Institution, did commit murder upon an inmate of the said penal institution, to-wit: one David Dale Jensen, by wilfully, unlawfully, deliberately and with malice aforethought, killing and murdering the said David Dale Jensen, a human being, by hitting the said David Dale Jensen in the head with a blunt object and kicking the said David Dale Jensen in the head and neck with his feet, thereby mortally wounding the said David Dale Jensen from which he sickened and died in the County of Ada, State of Idaho, on the 13th day of May, 1981.

All of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

/s/ JC Harris
JIM C. HARRIS
Ada County Prosecuting Attorney

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

June 19, 1981
DATE

COURT MINUTES

The State of Idaho,
Plaintiff,
vs.
THOMAS EUGENE CREECH,
Defendant(s).

Criminal
No. 10252

Appearances: Tape No. L352 815 thru 831

Ron Howen
Deputy Prosecuting
Attorney — Counsel for State

Tom Morden
Ada County Public
Defender — Counsel for Defendant(s)

THIS TIME SET FOR INITIAL ARRAIGNMENT:

✓ The Court informed the Defendant(s) of the charge(s) filed being a felony and of the possible penalties which could be imposed.

✓ The Court advised the Defendant(s) of the right to Counsel at public expense in all proceedings in this Court.

___ Right to Counsel waived by Defendant(s).

✓ Public Defender reaffirmed/appointed to represent Defendant(s).

___ Mr. _____ appearing as counsel of record for Defendant(s).

✓ The Court advised the Defendant(s) of the right to appeal from any judgment entered by this Court, to be represented by Counsel in said appeal and of payment of costs incurred in said appeal at public expense and of the appeal time being forty-two (42) days.

✓ True copy of the Information delivered to the Defendant(s) and Counsel.

✓ True name(s).

___ Defendant(s) corrected name is _____ .

✓ Formal reading of the Information waived by Defendant(s).

___ Upon direction of the Court, the Clerk read the Information to the Defendant(s).

✓ The Court advised the Defendant(s) of the different pleas that could be entered to the charge(s) set forth in the Information and of the statutory time, not less than one day, that could be taken before entering a plea(s).

___ Upon the request of the Defendant(s), the Court continued this matter until _____ for entry of a plea(s).

___ Statutory time waived by Defendant(s).

✓ In answer to the Court, the Defendant(s) entered a plea(s) of "Not guilty".

✓ There being no objection by the Defendant(s), the Court set this case for trial before the

Court and a jury at 9:00 A.M. on November 2, 1981 for 10 days .

___ In answer to the Court, the Defendant(s) entered a plea(s) of "Guilty".

___ Defendant(s) sworn and examined regarding plea(s).

___ The Defendant(s) indicated an understanding of the possible penalties and that no promises of leniency or threats had been made to induce the plea(s).

___ The Defendant(s) fully understands that the pleading "Guilty" the presumption of innocence, the constitutional right to a trial by jury, the right to confront accusers, the privilege against self-incrimination and the right of self-defense are waived. All legal and factual defenses and any defects in the State's case are waived.

___ The Court accepted the Defendant(s) plea(s) of "Guilty".

___ The Court set aside the Defendant(s) plea(s) of "Guilty" and directed the Clerk to enter a plea(s) of "Not Guilty" on behalf of the Defendant(s).

✓ Request for Discovery filed.

✓ Requested Compliance date set for July 3, 1981.

___

___ The Court ordered a Pre-Sentence Report and continued this matter until _____, 19__ at ___ P.M. for said report and disposition.

✓ Defendant(s) remanded to the custody of the Sheriff.

___ Defendant(s) continued on bond.

___ Defendant(s) continued on own recognizance.

REPORTER: Grace Tucker

ESTIMATED COST: $25.00

CLERK: Glenda

DATE: June 19, 1981

APPROVED BY:

/s/ Robert G. Newhouse
District Judge

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

August 28, 1981
DATE

COURT MINUTES

THE STATE OF IDAHO,
Plaintiff,

vs.

THOMAS EUGENE CREECH,
Defendant,

Case No. 10252

Tape No. L363 174 thru 253

Jim C. Harris
Ada County Prosecuting
Attorney — Counsel for state

Rolf Kehne
Ada County Public
Defender — Counsel for defendant

Defendant present with counsel, in custody.

Court reviews case.

Defense counsel requests courtroom be cleared. State objects and leaves matter to court's discretion.

Defense counsel comments re gag order. State comments re gag order speaks only to evidence.

Further argument by defense. Court orders courtroom cleared.

Jerry Sass, statesman, requests their attorney's presence to argue this matter. Court allows him to contact his counsel.

Courtroom cleared by bailiffs and marshalls.

Defense counsel comments, Mr. Creech wishes to enter a plea of guilty against Mr. Kehne's wishes and requests one week continuance.

State comments a continuance should be left to the defendants choice and unless defendant wishes a continuance the state objects.

Court inquires of defendant.

190 Defendant wishes to enter plea and requests the plea be entered today. Defendant has no objection to the public being present during the plea.

191 Defense counsel moves to withdraw from this case, as defendant will not follow his advise in this matter.

Motion DENIED by court.

Court will allow defendant to enter a plea of guilty and will allow the press and public to be present in the courtroom.

Defense counsel comments, Mr. Creech has been seen by a medical examiner and wishes to reserve the right to withdraw the plea if the medical report would deem it appropriate. So ordered.

Bailiffs allow press and public to re-enter the courtroom.

All present and ready to proceed.

Court directs clerk to enter plea of GUILTY.

State requests they may make an offer of proof regarding trial evidence.

199 THOMAS EUGENE CREECH sworn as to guilty plea.

200 State comments re trial facts in regard to this case.

202 State's exhibits 1, 2, 3, 4, 5,6,7, 8, 9, 10, 11, 12, 13, 14 and 15 are marked

State offers above listed exhibits.
Defense objects, exhibits irrelevant. Arguemnt [sic] by states.

Court will allow exhibits to be marked as more explicit argument, not as evidence.

213 State's 1, 2, 3, 4, 5,6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 admitted.

State requests submitting depositions as part of the pre-sentence report.

State will request death penalty and wishes to submit a brief, if plea is accepted the state wishes to respond further.

No comment by defense counsel unless ordered to do so.

228 Court examines defendant as to guilty plea.

243 State examines defendant.
No questions by defense counsel.

246 Court accepts GUILTY plea.

Court orders pre-sentence investigation, report must be submitted to counsel seven days prior to sentencing.

Defense requests sentencing be set after they have received the report.

Court continues to September 25, 1981 at 9:00 a.m. for appearance and to reset sentencing.

State comments they will not be available until October 21.

Defendant REMANDED.

REPORTER: Grace Tucker
ESTIMATED COST: $25.00
CLERK: Glenda
DATED: August 28, 1981

Approved by:

/s/ Robert G. Newhouse
DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

January 11, 1982
DATE

COURT MINUTES

The State of Idaho,
Plaintiff,
vs.
THOMAS EUGENE CREECH,
Defendant,

NO. 10252

Appearances:

Tape No.	AA-45	0066	thru	2576
	AA-46	0003	thru	3348
Tape No.	AA-47	0001	thru	1294

Jim C. Harris
Ada County Prosecuting Attorney — Counsel for state

Rolf Kehne
Weibe and Associates — Counsel for defendant

SENTENCING HEARING: 9:00 a.m.

Defendant present with counsel, in custody.

Court reviews case. State and defense ready to proceed.

0136 State makes opening statements and requests the court to take judicial notice of the entire file and pre-sentence reports. State submits Death Warrant to the court.

0155 Defense objects to judicial notice of file and objects to the court reading the pre-sentence report.

0200 State argues.

0251 Court denies motion and takes judicial notice of the file and pre-sentence reports.

0271 State calls first witness.

0306 LAMAR HEYREND sworn and examined as state's witness.

0767 Defense requests brief recess.

9:57 a.m.

10:32 a.m. Court reconvened. All present.

0792 LAMAR HEYREND resumes stand for cross-examination by defense.

REPORTER: Dianne Cromwell

ESTIMATED COST: $300.00

CLERK: Glenda Longstreet

DATE: January 11, 1982

Approved by:

/s/ Robert G. Newhouse
District Judge

1546 Re-direct examination.

1575 Witness excused.

1588 CHUCK PALMER sworn and examined as state's witness.

2576 Examination by defense.

3140 NEW TAPE AA-46

0003 CHUCK PALMER's cross-examination continues.

0127 Re-direct examination by state.

0136 Witness finished.

0141 DAN DOUGHIT sworn and examined as state's witness.

0195 State's exhibits 1, 2, 3, 4, 5, 6 and 7 are marked.

0256 State's 1, 2, 3, 4 offered.

0282 Cross examination as to state's exhibits. Defense objects to their admission.
State's exhibits 1, 2, 3, 4 admitted.
Direct examination of witness continues.
State's exhibits 5, 6 and 7 offered.

0447 Cross examination by defense.

0466 Re-direct examination by state.

0488 Re cross examination by defense.

0559 Re-re-direct examination by state.

0582 Witness finished.

0591 Court recessed until 1:30 p.m. this afternoon.

1:30 p.m. Court reconvened. All present, defendant in custody.

0620 LARRY E. WRIGHT sworn and examined as state's witness.

0724 Cross-examination by defense.

0847 Witness finished.

0854 DALE JENSEN sworn and examined as state's witness.

1114 Cross examination by defense – no questions.

1127 Witness excused.
State rests.
Brief recess.

2:15 p.m. Court reconvened, all present.

1151 JOHN STONER sworn and examined as defense witness.

2354 Cross examination by state.

2708 Re-direct examination by defense.

2961 Defendants exhibit A is marked and admitted.

3268 Defendant's exhibit B marked and admitted.

3348 NEW TAPE AA-47

0020 Court examines witness.
Witness excused.

0049 JIM HOPE sworn and examined as defense witness.

0081 Witness excused.

0088 Brief recess. 3:10 p.m.

3:23 p.m. Court reconvened. All present, defense counsel not present.

0109 Defense counsel now present and ready to proceed.

3:24 p.m.

0118 THOMAS EUGENE CREECH sworn by clerk. Witness makes a statement to the court.

0516 Direct examination by defense.

0605 Cross examination by state.

0649 Re-direct examination by defense.

0675 Witness finished.

3:44 p.m. Defense rests.

0700 State's closing arguments.

0867 Defense closing arguments.

1128 Further argument by state.

1204 Court advises defendant of appeal rights and in this case a possible automatic appeal.

Court takes sentencing under advisement.

1259 Defense counsel requests their pre-sentence report be released to the defendant.

No objection by state. Court so orders.

1280 State requests the gag order in this matter be lifted.

1294 Court lifts the gag order, state to prepare order.

State's pre-sentence report returned to clerk.

Defendant REMANDED.

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, vs. THOMAS EUGENE CREECH, Defendant.	)	Case No. 10252 (Filed Jan. 25, 1982)

* * *

FINDINGS OF THE COURT
IN CONSIDERING THE DEATH PENALTY
UNDER SECTION 19-2515, Idaho Code

The above defendant having entered a plea of guilty to the criminal offense of Murder of the First Degree, which under the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW THEREFORE the Court hereby makes the following findings:

1. Conviction. That the defendant while represented by court-appointed counsel, Rolf Kehne, was found guilty of the offense of Murder in the First Degree pursuant to a plea of guilty.

2. Presentence Report – That a presentence report was prepared by order of the court and delivered to the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. Sentencing Hearing. That a sentencing hearing was held on January 11, 1982, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. Facts and Argument Found in Mitigation.

(a) That the defendant is a mature man, 31 years of age.

(b) That the defendant is probably employable, and is capable of being further trained and educated. He is of an adequate intelligence, and is an extremely talented writer.

(c) That the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself.

5. Facts and Arguments Found in Aggravation.

(a) That the defendant has, repeatedly, throughout his life, committed many murders.

(b) That the victim was a young, inexperienced, handicapped man. He had both physical and mental impairments.

(c) That the victim, once the attack commenced, was under the complete domination and control of the defendant. The murder itself

was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the defendant's murder then took on many of the aspects of an assassination. These violent actions of the defendant went well beyond self-defense.

(d) That the defendant indicates an intention to commit continued murders in the future, which, based on his record, is extremely probable.

(e) That the defendant, heretofore, has been sentenced to death by the district court of the State of Idaho. Such death sentence was reversed by the Idaho Supreme Court.

(f) That the defendant is unable to be rehabilitated.

(g) That, during the incident, the defendant was not under the influence of any mind-controlling substance. The murder, once commenced, appears to have been an intentional, calculated act.

6. Statutory Aggravating Circumstances Found under Section 19-2515(f), Idaho Code.

These aggravating circumstances are all found by this Court to be beyond a reasonable doubt.

A. The defendant was previously convicted of another murder, to-wit:

1. March 25, 1976. Two Counts of First Degree Murder. Sentenced to life on each charge.

2. April 23, 1979. First Degree Murder. Sentence was 99 years.

3. November 4, 1980. First Degree Murder. Sentence was life.

B. By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. After the victim was helpless the defendant killed him.

C. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (c). The defendant was under a sentence for Murder of the First Degree at the time of his actions.

D. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (e). The defendant committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.

E. The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society. It is clear from the entire proceedings that the defendant will murder again, and again, unless physically restrained. This court does not know how this can be done since, after all, the defendant committed the present offense while in maximum security.

7. Reasons Why Death Penalty Was Imposed.

This defendant intentionally destroyed another human being at a time when he was completely helpless. He has repeatedly murdered others over, and over, and over again. He intends to keep on killing and can't be

stopped. This court knows of no way to protect the society which it represents except by an execution. If the Death Penalty had been invoked before, many citizens would remain alive.

The defendant has made many requests upon this Court to impose this Death Penalty. In that regard a comment is in order. This Court does not impose the Death Penalty because of these pleadings or public demonstrations made by the defendant. A Court should not grant anyone legal suicide. This Court imposes the Death Penalty upon this defendant because he earned it.

The Court finds that the mitigating circumstances do not outweigh the gravity of the aggravating circumstances so to make unjust the imposition of the Death Penalty.

That the Death Penalty should be imposed on the defendant for the capital offense of which he was convicted.

Dated this 25th day of January, 1982.

/s/ Robert G. Newhouse
ROBERT G. NEWHOUSE
District Judge

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff,	)	Case No. 10252
vs.	)	JUDGMENT OF
THOMAS EUGENE CREECH,	)	CONVICTION
Defendant.	)	(Filed Jan. 25, 1982)

This being the time fixed by the Court for pronouncing sentence upon the defendant, the Court noted the presence of Jim C. Harris, Prosecuting Attorney of Ada County, Idaho, Thomas Eugene Creech, the defendant, and Rolfe Kehne, attorney for the defendant, in Court.

The defendant was duly informed as follows:

1. Of the Information filed against the defendant for the crime of MURDER IN THE FIRST DEGREE, 18-4001 and 18-4003 of the Idaho Code, committed on or about May 13, 1981.

2. Of the defendant's plea of guilty on this charge on August 28, 1981.

The Court, then, after this plea of guilty, ordered a presentence investigation, and convened a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense, in accordance with 19-2515 of the Idaho Code, and Rule 33.1 of the Idaho Criminal Rules; and the Court having entered written findings setting forth the

statutory aggravating circumstances found, and the mitigating circumstances considered; and the Court having found that the mitigating circumstances found do not outweigh the aggravating circumstances found so as to make unjust the imposition of the death penalty; and the Court having found no legal cause or reason why judgment and sentence should not be pronounced against the defendant at this time; does render its judgment of conviction as follows, to wit:

That, whereas, the defendant having plead guilty in this Court to the crime of Murder in the First Degree, 18-4001 and 18-4003 of the Idaho Code.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendant, Thomas Eugene Creech, is guilty of the crime of Murder in the First Degree, 18-4001 and 18-4003 of the Idaho Code, and that he be sentenced on this charge to be punished by death by the Idaho State Board of Correction, on March 12, 1982 at 9:00 a.m., in the manner prescribed by law. The defendant may remain in the Ada County Jail until his sentence is to be executed.

Dated this 25th day of January, 1982.

/s/ Robert G. Newhouse
ROBERT G. NEWHOUSE
District Judge

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent,	)	Supreme Court No. 14480
v.	)	ORDER
THOMAS EUGENE CREECH, Defendant-Appellant.	)	(Filed Feb. 25, 1983)

In the above-entitled cause, defendant Creech entered a plea of guilty to a charge of first degree murder and in accordance with I.C. § 19-2515, the district court conducted a hearing into mitigating or aggravating circumstances and thereafter on the 25th day of January, 1982, the district court purported to impose the death sentence upon the defendant; and

The cause being before this Court both on appeal by the defendant and also pursuant to the automatic review of death sentences mandated by I.C. § 19-2827; and

It appearing from the record, without any contention otherwise by the respondent State of Idaho, that contrary to the requirements of I.C. § 19-2503 and I.C.R. 43(a), the trial judge purported to impose sentence in the absence of defendant and his counsel and without the presence of defendant and his counsel in open court, but rather by means of a written imposition of a sentence of death;

NOW, THEREFORE, IT IS HEREBY ORDERED that the sentence of death imposed upon the defendant in the absence of the defendant and his counsel be and the same

hereby is vacated and the cause is remanded to the Honorable Robert Newhouse, District Judge of the Fourth Judicial District of the State of Idaho, Ada County, who shall within fourteen (14) days from the date of this Order, in open court and in the presence of defendant and his counsel, enter a judgment of conviction and impose such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event that said Judge shall impose a sentence of death, a warrant therefore shall issue in accordance with I.C. § 19-2705; and

IT IS FURTHER ORDERED that on the completion of said proceedings a transcript thereof shall be immediately prepared, delivered and lodged with this Court not later than five (5) days from the completion of said proceedings; and

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this cause pending compliance with this Order and thereafter will determine the issues on appeal; and

IT IS FURTHER ORDERED that this Order be served upon the Honorable Robert G. Newhouse, District Judge of the Fourth Judicial District, the Office of the Attorney General, and counsel for the defendant.

DATED this 24th day of February, 1983.

By Order of the Supreme Court.

/s/ Allan G. Shepard
ALLAN G. SHEPARD,
Acting Chief Justice

ATTEST: /s/ Judy E. Czymich
Deputy Clerk

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, vs. THOMAS EUGENE CREECH, Defendant,	)	Case No. 10252 ORDER (Filed Mar. 15, 1983)

In accordance with the several orders of the Idaho Supreme Court, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant Thomas Eugene Creech, and his counsel, appear in front of this court on Thursday, March 17, 1983 at 9:00 A.M. so that this court may conduct a hearing and carry out all of the directives of the Idaho Supreme Court.

Dated this 15th day of March, 1983.

/s/ Robert G. Newhouse
ROBERT G. NEWHOUSE
District Judge

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
303 W. Bannock
Boise, Idaho 83702
Telephone: 343-6466

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, -vs- THOMAS CREECH, Defendant.	Criminal No. 10252 MOTION VACATING SENTENCING HEARING and RESET (Filed Mar. 16, 1983)

COMES NOW, the above named Defendant, by and through his Attorney of Record, ROLF M. KEHNE, and respectfully moves this Honorable Court for its order vacating and resetting the sentencing hearing. This motion is supported by affidavit of counsel, attached hereto and incorporated by reference herein.

Dated this 16th day of March, 1983.

/s/ Rolf M. Kehne
ROLF M. KEHNE
Attorney for Defendant

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
303 W. Bannock
Boise, Idaho 83702
Telephone: 343-6466

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, -vs- THOMAS CREECH, Defendant.	Criminal No. 10252 AFFIDAVIT IN SUPPORT OF MOTION TO VACATE

STATE OF IDAHO)
ss.
County of Ada)

ROLF M. KEHNE, being first duly sworn upon his oath, deposes and says:

1. That I am the Attorney of Record, in the above entitled action;

2. That my office staff informed me that notice of the time and date for sentencing was given approximately noon, March 15, 1983;

3. That I received actual notice of the time and date the evening of March 15, 1983;

4. One and one half (1½) days is insufficient time to prepare and present witnesses on behalf of the defendant.

/s/ Rolf M. Kehne
ROLF M. KEHNE

SUBSCRIBED and SWORN to before me this 16th day of March, 1983.

/s/ Diane Gleason
Notary Public for Idaho
Residing at Boise, Idaho

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE — March 17, 1983
District Judge — Date

COURT MINUTES

The State of Idaho, Plaintiff, vs. Thomas Eugene Creech, Defendant.	)	No. 10252

TIME SET FOR RESENTENCING:

Appearances: Tape No. X66 0386 thru 0463

Greg Bower — Counsel for the State
Prosecuting Attorney

Rolf Kehne — Counsel for the Defendant
Deputy Public Defender

0386 9:17 Call of the case by the Court with review regarding defendants being filed.

The Court reviews prior procedures and comments on reading the Courts findings.

The defense objects. There is no objection by the State.

0390 The Court reads the findings of the Court in open court.

0403 The Court reaffirms these findings.

0404 The defense enters objections to the findings of the Court.

0417 Response by the State.

0419 Further comments by the defense.

0420 The Court denied objection of the defense.

Defense files motions with the Court. There is no objection by the State.

0422 The Court files in open court the defense motions.

0423 Comments by the defense regarding the motion to vacate hearing.

There is no response by the State.

0426 The Court denied motion to vacate hearing.

0428 Comments by the defense and Court.

The Court directs the State to prepare an order denying defense motion to vacate sentencing hearing and resetting it.

0431
9:40 Court in recess for the State to obtain copies of motions filed by the defense.

9:50 Court reconvened with comments by State regarding receiving copies of the motions.

0433 Comments by the defense regarding motion to suspend proceedings.

Response by the State.

0435 Further comments by the defense.

The Court denies motion and directs State to prepare order.

Comments by the defense regarding demand for jury is part of hearing.

Response by the State.

0436 The Court denies and directs State to prepare order.

Comments by the defense regarding motion for live witnesses, motion to compel, motion for disclosure, motion and order for locations of inmates of 9 house #C, motion for inspections and motion for release of pre-sentence investigation.

0443 The Court grants the order for pre-sentence investigation.

There is no objection by the State.

Court signed in open Court order for pre-sentence investigation.

0444 The State comments regarding motions being moot.

Response by the defense.

Court denied all motions of defense and directs the State to prepare the orders.

0445 Comments by the State regarding custody of defendant.

0446
10:00 The Court is in recess by request of the defense.

10:40 Court is reconvened. The defense comments regarding filing motion with the Supreme Court and requests continuance to prepare for live testimony.

The motion is denied by the Court.

0450 The Court is to impose sentence with review of prior Court proceedings and acknowledges the pre-sentence investigation.

0454 The defense comments in objection to sentencing today.

The Court denied the motions of the defense.

The Court affirms the findings of the Court and reads the Judgment of Conviction. Orders death penalty to be executed April 29, 1983 at 9:00 a.m.

The Court will allow the sheriff 24 hours to transfer the defendant to the custody of I.S.B.C.

The defense comments regarding custody.

The state responds.

0461 Court will allow the defendant to remain in Ada County Jail until the imposition of the sentence until objections are made by I.S.B.C.

The defense comments with the Court.

The Court directs the State to prepare Death Warrant.

0463 The defendant is remanded.
10:50

REPORTER: Grace Tucker

ESTIMATED COST: $100.00

CLERK: Mary Gwyn/by Liz

DATE: March 18, 1983

APPROVED BY:

/s/ Robert G. Newhouse
District Judge

[p. 8] BOISE, IDAHO

Thursday, March 17, 1983, 9:15 a.m.

APPEARANCES:

For Plaintiff GREG H. BOWER
Ada County Prosecuting Attorney
103 Ada County Courthouse
Boise, Idaho 83702

For Defendant ROLF M. KEHNE
Ada County Public Defender
303 West Bannock
Boise, Idaho 83702

THE COURT: I will now take up the case of the State of Idaho, Plaintiff, versus Thomas Eugene Creech, case number 10252 on the court docket.

This matter is in front of the Court upon remand and order of the Idaho Supreme Court.

I do note for the record that a lot of motions were filed on behalf of the defendant yesterday.

Before we take up this matter, I think it would be proper to go through and outline the procedure, since it might be a little confusing to various parties, so that we make sure everybody is with us in this regard.

This matter was remanded back on [p. 9] February 24th, 1983 by the Idaho Supreme Court ordering this Court to enter a judgment of conviction and impose such sentence upon the defendant as to the district judge may appear to be just and appropriate.

This matter was stayed and the stay has been lifted and is now back in front of the Court in that regard.

For the record, it appears to the Court that there are other matters that properly should be read in open court. And in lieu of any legal objections by either counsel, it is the intent of this Court to read the Court's findings before we take up the motions and the other matters.

Are there any objections, since there seems to be some question in regard to reading these matters, to reading the Court's findings heretofore entered by the Court?

Mr. Kehne?

MR. KEHNE: I don't object to your reading them into the record, Your Honor. We object to several of the findings themselves.

THE COURT: Very well. The record will note your statements in that regard.

Mr. Bower, do you have any objections?

MR. BOWER: No, Your Honor.

[p. 10] THE COURT: Very well. The Court having heretofore and on January 25th, 1982, having entered the following findings, I will read the same for the benefit of Mr. Creech, since they have never been read formally in open court. (Reading:)

"FINDINGS OF THE COURT IN CONSIDERING THE DEATH PENALTY UNDER SECTION 19-2515, Idaho Code.

"The above defendant having entered a plea of guilty to the criminal offense of Murder of the

First Degree, which under the law authorizes the imposition of the death penalty; and the Court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

"NOW THEREFORE the Court hereby makes the following findings:

"1. *Conviction.* That the defendant while represented by court-appointed counsel, Rolf Kehne, was found guilty of the offense of Murder in the First Degree pursuant to a plea of guilty.

"2. *Presentence Report.* That a presentence report was prepared by order of the court and delivered to the defendant or his counsel at least seven days prior to the sentencing hearing pursuant [p. 11] to 19-2515, Idaho Code, and the Idaho Criminal Rules.

"3. *Sentencing Hearing.* That a sentencing hearing was held on January 11, 1982, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the Court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

"4. *Facts and Argument Found in Mitigation.*

(a) That the defendant is a mature man, 31 years of age.

(b) That the defendant is probably employable, and is capable of being further trained and educated. He is of an adequate intelligence, and is an extremely talented writer.

(c) That the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself.

"5. *Facts and Arguments Found in Aggravation.*

(a) That the defendant has, repeatedly, throughout his life, committed many murders.

(b) That the defendant has, repeatedly, throughout his life, committed many murders.

(b) That the victim was a young, inexperienced, handicapped man. He had both physical and mental impairments.

[p. 12] (c) That the victim, once the attack commenced, was under the complete domination and control of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the defendant's murder then took on many of the aspects of an assassination. These violent actions of the defendant went well beyond self-defense.

(d) That the defendant indicates an intention to commit continued murders in the future, which, based on his record, is extremely probable.

(e) That the defendant, heretofore, has been sentenced to death by the district court of the State of Idaho. Such death sentence was reversed by the Idaho Supreme Court.

(f) That the defendant is unable to be rehabilitated.

(g) That during the incident the defendant was not under the influence of any mind-controlling substance. The murder, once commenced, appears to have been an intentional, calculated act.

"6. *Statutory Aggravating Circumstances Found Under Section 19-2515(f). Idaho Code.*

These aggravating circumstances are all found [p. 13] by this Court to be beyond a reasonable doubt.

"A. The defendant was previously convicted of another murder, to-wit:

1. March 25, 1976. Two counts of First Degree Murder. Sentenced to life on each charge.

2. April 23, 1979. First Degree Murder. Sentence was 99 years.

3. November 4, 1980. First Degree Murder. Sentence was life.

"B. By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. After the victim was helpless the defendant killed him.

"C. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (c). The defendant was under a sentence for Murder of the First Degree at the time of his actions.

"D. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (e). The defendant committed the murder on a fellow inmate while both were

incarcerated in the Idaho State Correctional Institution.

"E. The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited [p. 14] a propensity to commit murder which will probably constitute a continuing threat to society.

"It is clear from the entire proceedings that the defendant will murder again, and again, unless physically restrained.

"This Court does not know how this can be done since, after all, the defendant committed the present offense while in maximum security.

"7. *Reasons Why Death Penalty Was Imposed.*

"This defendant intentionally destroyed another human being at a time when he was completely helpless. He has repeatedly murdered others over, and over, and over again. He intends to keep on killing and can't be stopped. This court knows of no way to protect the society which it represents except by an execution. If the Death Penalty had been invoked before, many citizens would remain alive.

"The defendant has made many requests upon this Court to impose this Death Penalty. In that regard a comment is in order. This Court does not impose the Death Penalty because of these pleadings or public demonstrations made by the defendant. A Court should not grant anyone legal suicide. This Court imposes the Death Penalty upon this defendant because he earned it.

"The Court finds that the mitigating [p. 15] circumstances do not outweigh the gravity of the aggravating

circumstances so as to make unjust the imposition of the Death Penalty.

"That the Death Penalty should be imposed on the defendant for the capital offense of which he was convicted.

"Dated this 25th day of January, 1982, signed by myself as district judge." (End reading.)

For the record, at this time I do affirm and reiterate these findings as of today.

Now, I will take up any matters we should take up before carrying out the mandate and order of the higher court in this particular proceeding.

And in that regard, Mr. Kehne, do you have anything that you would like to say on behalf of your client, and I do note these motions have been filed and you may approach them in any manner you wish.

MR. KEHNE: I would first like to put on the record my objection to the findings just read by the Court.

I would like to start with Section 4 of the Facts and Arguments Found in Mitigation. We don't object to any in that section.

In Section 5, Facts and Arguments Found in [p. 16] Aggravation, the Court has listed a whole series of aggravating factors which, according to the way this is written, I assume were weighed against the mitigating factors in arriving at the death penalty.

It was wrong to place any of these factors in the findings and it was wrong to weigh them because they are not statutory aggravating factors. We had no notice during the sentencing hearing that these particular factors were being considered as aggravating factors.

Further, the statute itself in its text does not allow the consideration of any aggravating factors other than those specifically enumerated in the statute.

And furthermore, the cruel and unusual and due process clauses do not allow the Court to weigh nonstatutory aggravating factors against mitigating factors in arriving at the death penalty.

We specifically object as facts that the victim was a young, inexperienced, handicapped man, and we would submit to the Court that the evidence shows that he was a young tough seeking a reputation for toughness and that was his motive for attacking Tom Creech to gain that reputation among the convicts.

That the victim was under the complete domination and control of the defendant, that the murder was extremely gruesome, that the killing was like an [p. 17] assassination. Again, these are nonstatutory aggravating factors and we submit they are inconsistent with the facts of the case. An assassination would seem to be a cold, calculated, unemotional murder.

And there's no question but this killing was in response to the second unprovoked deadly-force attack by David Jensen on Mr. Creech in the same day. And there was nothing cold or emotionless about his response to the attack.

Again, D and E are nonstatutory factors and therefore should not have been considered by the Court, the same with F and G.

And we submit that the facts are inconsistent with the Court's finding that the murder once commenced appears to be an intentional calculated act and that he was – by the uncontradicted testimony of the psychologist, the most intelligent way to look at Tom's actions at the time of the crime, shows anything but calculation.

In fact, he was out of control and unable to control his response and probably not aware of what he was doing at the time of repeated self defense due to his mental illness.

The Statutory Aggravating Circumstances, we object to 6(a) because there has been no competent proof [p. 18] of prior convictions in the case. There is well-established procedure under Idaho law for proving prior convictions; we do it in habitual criminal trials all the time. And no such evidence was presented to the Court.

We object to Finding B, the utter disregard, because, first of all, utter disregard is unconstitutional and vague and overbroad and violates a cruel and unusual clause for its failure to adequately channel the sentencing authority's discretion.

We also object to it on the facts of the case. Whatever the legislature meant by "utter disregard," which the Supreme Court defined further and refined further in Osborn, it can't possibly be applied to a killing that is in response to an unprovoked deadly-force attack by the

victim. It cannot be applied to a victim-precipitated homicide.

The finding is also inadequate for failure to show that the Court has appreciated the refinement and the gloss that the Osborn case puts on that language as ordered by the Supreme Court of this state.

We object to Findings C and D in the statutory list because there are no such aggravating factors in the statutory list.

The Court has found and weighed two factors [p. 19] in its Statutory Aggravating Circumstances findings that are nowhere in the statute; they do not exist.

We object to the last finding in the Section E, first of all, because the propensity to commit murder which will probably constitute a continuing threat to society language, allows the finding of something beyond a reasonable doubt, which is only probable and it is therefore unconstitutional.

We also object to it on the facts. We would submit to the Court that that finding should not be looked at, or that aggravating factor should not be looked at, in isolation: how dangerous Tom might be if we let him out on the street tomorrow.

It should be looked at as how dangerous he is in particular circumstances he finds himself. He must be the world's least likely parole candidate. It is very doubtful he would ever be made a trusty again. In fact, it is unthinkable.

It is unthinkable that he would spend the rest of his life any way other than in isolation and locked up and

free from being harmed by other people or being in a position that he could harm other people.

And we would also like to note to the Court that the language in the subsection itself is aimed right at the particular offense. Nothing about Tom's [p. 20] background or his record or his personality traits are properly taken into consideration there.

The factor is aimed solely at the facts of the particular case. And recalling that this case started out as self defense, it's a crime only because it was an excessive response to self-defense;

That this particular crime does not show that Tom is a continuing threat to anyone other than people who attack him with deadly-force and without provocation. Thank you.

THE COURT: Thank you very much, Mr. Kehne.

Mr. Bower, do you desire to make any comments in that regard for the record?

MR. BOWER: Your Honor, the only comment I care to make is with regard to counsel's approach to your statutory aggravating circumstances under A.

And I think that there certainly is no requirement in a sentencing hearing when the Court's own investigator prepares a criminal record for the Court that would come forward and prove something to the Court in a sentencing hearing as if we are proving an habitual offender case to the jury.

I certainly think that the Court's investigator's report shows practices and processes in preparing what was a very carefully done presentence [p. 21] report and a very carefully done presentencing hearing are appropriate. Thank you.

THE COURT: Thank you, Mr. Bower.

Mr. Kehne, do you have any further response you [would] like to make in regard to these objections?

MR. KEHNE: I would like to add that originally we filed a demand that the sentencing and the findings be done according to the statute on sentencing hearings 19-2516, which states in mandatory language that the circumstances shall be inquired into by live witnesses under oath.

And the circumstances they must be talking about in that section are the statutory aggravating and mitigating circumstances in the prior section, 2515.

And we still stand on that demand and we still believe it is our right to have the Court make its findings only on the basis of live witnesses, and I just want the record to be clear that we are not waiving that.

THE COURT: Thank you, Mr. Kehne.

The objections are denied. The Court considers the findings that it made was in accordance with the Idaho law.

Mr. Kehne, do you have any further of these motions that you would like to take up at this time?

MR. KEHNE: Judge, I have some more to file today.

[p. 22] THE COURT: Do you have any objections to the filing of these motions, Mr. Bower?

MR. BOWER: No, I have no objection to the Court's looking at those.

THE COURT: Very well. They may be filed at this time. At least the motion and the demand for jury sentencing will be filed. The rest of them are proposed orders, I gather.

Very well. You may proceed, Mr. Kehne, in any manner you wish.

MR. KEHNE: Judge, I would start out – I guess the best place to start is with the motion to vacate this hearing and continue it to a future date.

THE COURT: Let me glance at each motion as we go along. I have read them before, but I want to make sure that I read them again and refresh my memory.

Very well. You may proceed.

MR. KEHNE: If the Court reads the Supreme Court's order as authorizing the Court to do only as it already has done – in other words, read the findings and also read the sentence of death in open court – then I suppose there is no point in me having time to prepare a sentencing review.

I had actual notice of this hearing Tuesday night, and that simply is not time for me to prepare a [p. 23] series of witnesses to come in and try to prove mitigating circumstances surrounding the crime.

I think the Supreme Court's order leaves a little bit to be desired in the amount of direction it gives. On the one

hand it sounds like it empowers the Court only to read the findings and the death sentence in open court and follow the statutes on arraignment for sentence.

On the other hand, the order authorizes the Court to impose any sentence which it feels to be just and appropriate under all the circumstances, which I would suggest gives us the authority to start from Square One and put on evidence and try to convince the Court to impose a sentence other than death.

And if we are to have such hearing, I have to have more notice in advance to get people here in a day and a half.

THE COURT: Thank you, Mr. Kehne.

Mr. Bower, do you have any comments you would like to make in that regard?

MR. BOWER: No.

THE COURT: Very well. I am going to deny the motion. I will state why. The Idaho Supreme Court in my opinion has, by their statements, gone along with all the hearings I have had in regard to sentencing.

[p. 24] I can't see that there is any more required in this particular proceeding other than an argument. I don't intend to let the witnesses all come back and all the presentence people brought in and go back clear through farther than that point before I made these findings.

And I have also been given a deadline, I do note for the record, that I have to have this done. And I might add, this is about the only time I have. I have solid cases that should be heard between now and the deadline.

So I am going to deny the motion to continue, the motion vacating sentencing hearing and reset.

MR. KEHNE: Just to clarify the record so I'm not charged with a waiver that I didn't intend, would the Court's ruling be the same if I secured from the Supreme Court an order extending the deadline?

THE COURT: Oh, yes, I think we ought to get this matter going. I think it's up to the Supreme Court to control this matter. If you get an order, you are welcome to do so, Mr. Kehne, and I will abide by the same.

MR. KEHNE: But as the order reads now, even if the Court had more time, the Court would rule that we are not to start all over again with witnesses?

[p. 25] THE COURT: Well, not without cause. You haven't given me any cause.

Mr. Bower, I will direct you to prepare an appropriate order for the Court's signature denying the motion vacating sentencing hearing and reset.

MR. BOWER: I would like a copy of that. I never got a copy of that particular motion.

MR. KEHNE: Did you get several others I left at your office yesterday?

MR. BOWER: No. Maybe they just haven't got in my file yet.

THE COURT: If you feel it is necessary, I could take a short break and let my clerk give you copies of these matters, Mr. Bower.

MR. BOWER: The only motions I have here are the ones counsel I believe just filed with the Court.

MR. KEHNE: I left them with the receptionist yesterday afternoon.

MR. BOWER: They haven't found their way –

THE COURT: Well, let's take a short recess then and then we will take up as soon as you locate these motions, Mr. Bower.

And if you need the same, my clerk will be glad to furnish the same.

THE BAILIFF: All rise, please.

[p. 26] (Recess.)

THE COURT: Thank you. I will again take up the case of the State of Idaho, Plaintiff, versus Thomas Creech, case number 10252.

Mr. Bower, before we start, have you received copies of these various motions?

MR. BOWER: I have, Your Honor. I found the spot where they were in my office and I have them in my possession.

THE COURT: Very well, then. Mr. Kehne, you may proceed.

MR. KEHNE: I think logically the next motion in order would be the motion to suspend proceedings and appoint a designated examiner to examine the competence of the defendant and proceed to sentencing.

THE COURT: Very well. You may proceed with your argument.

MR. KEHNE: I would just rely on the representations I made in the motion.

THE COURT: Mr. Bower, do you have any statements you would like to make in regard to that motion?

MR. BOWER: Well, I don't think that this procedure, pursuant to 18-211(1), would be the appropriate procedure under our procedural statutes.

I believe if there were a sentencing date, if [p. 27] this case were remitted back to this Court, then there is a procedure for counsel to explore this particular problem, if it does exist.

But I think under the current stated case where, as soon as the Court makes a ruling today having basically done what the Supreme Court has requested, these matters will go back to the Supreme Court.

And until such time as there is a sentencing date set by this Court on remittitur from the Supreme Court, these matters are moot.

THE COURT: Mr. Kehne, do you have any comments you would like to make in response?

MR. KEHNE: Your honor, I would submit that the statute being relied on is appropriate as long as there are judicial proceedings against the defendant.

The other procedure is to prevent an insane man from actually being executed. And I don't think we are to that step.

THE COURT: I am included to agree with the state. Motion denied. I will direct the state to prepare an appropriate order for the Court's signature.

MR. KEHNE: The next motion I would like to take up is – it is not exactly a motion. It's just a demand for jury participation in sentencing. And I will rely on that. I just filed that to make sure we didn't have an [p. 28] unintentional waiver of our right to jury sentencing.

THE COURT: Mr. Bower, do you have any comments in regard to that motion? Or demand, I should say.

MR. BOWER: No, judge. I think the record of waiver is clear in this case.

THE COURT: I will deny the demand for jury sentencing, feeling it is the opinion of this Court that the sentencing procedure used by the Court is in accordance with the laws of the State of Idaho.

I will direct the state to prepare an appropriate order for the Court's signature.

MR. KEHNE: By implication, the Court has ruled against the other motions. The other motions are all designed to help us have a more meaningful opportunity to present evidence in mitigation and to present live witnesses which would rebut the findings made by the Court last time in aggravation which were again adopted by the Court today.

Specifically, we would like to dispute the – by presenting live witnesses, we believe we would dispute the finding that the victim was handicapped, that this was an assassination, that there was an intent to kill, that it was a

calculated act, that the defendant exhibited utter disregard.

And in order to gather all that information [p. 29] together, we would need the institutional jackets, or at least access to the institutional jackets, of both defendant and victim. And that is my motion to compel.

And we would need the current whereabouts, if it is known by the institution, of four people listed in the motion for disclosure who were in the penitentiary and were witnesses to the actual crime and knew the background leading up to the crime but who are not longer in the institution.

I believe they are all on parole. Maybe they toughed out their sentences and the institution doesn't know where they are. But Louis Segalson, Chuck Isaacson, et cetera, listed on that motion would have been material witnesses and I think if they are on parole, the state would know where they are. And that is our motion for disclosure, their whereabouts.

Motion and order for a list of names and current whereabouts of inmates residing in 9 house, C Tier when Jensen first arrived.

We are seeking that because we don't have that information available to us and is kept in records at the institution and those people would have important evidence concerning the character of the victim David Jensen which would help us establish our mitigation.

[p. 30] And our motion for inspection was to help us gather evidence for a hearing in mitigation. Specifically, we moved the Court to order the Board of Corrections to

permit me and one witness to inspect and photograph the scene of the crime in preparation of the sentencing hearing.

And the last motion I have is for release or production of a copy of the presentence report. That is because I do not have one in my possession. Mr. Chreech himself took mine and he sent it to relatives somewhere. And I don't have one today as I come to this hearing.

THE COURT: Mr. Bower, do you have any – let's start out with, probably to make it easy, do you have any objections to giving the defense counsel a copy of the – signing the order for release of the presentence report?

MR. BOWER: None.

THE COURT: Very well. At this time then I will grant that particular order and I will sign the proposed order if you have no objections to its general form.

MR. BOWER: No. I think he is entitled to have in his file a copy of that presentence report, within the limits of the Supreme Court Rule 37(g).

THE COURT: Very well. I will sign this order at this time that the presentence investigation report in the above-entitled matter be released to defense counsel.

[p. 31] Now, do you have any comments in regard to the other motions that you would like to place on the record?

MR. BOWER: In light of the Court's ruling on counsel's other motion, I think these motions are moot.

THE COURT: Anything further, Mr. Kehne?

MR. KEHNE: No, Your Honor.

THE COURT: Very well. I am of the opinion that the prior comments of the Court covers these motions and I am going to deny all of them and I will direct the state to prepare an appropriate order in those regards.

Are there any further matters we should take up before carrying out the order of the Supreme Court?

MR. BOWER: Only, Your Honor, I assume the Court will be ordering the defendant back into the custody of the Idaho State Board of Corrections. If such is the case, I would ask the court for 24 hours to make that transfer.

MR. KEHNE: Your Honor, Mr. Creech and I have something we would like to discuss before we proceed with the actual imposition of sentencing.

THE COURT: You would like a short recess?

MR. KEHNE: Yes.

THE COURT: Very well. We will take a short recess then.

[p. 32] THE BAILIFF: All rise, please.

(Recess.)

THE COURT: Thank you. Again I will take up the case of the State of Idaho, Plaintiff, versus Thomas Creech, case number 10252.

Mr. Kehne, you asked for a recess. Is there anything further you want to take up before the sentencing?

MR. KEHNE: I would like to clarify the record, Your Honor. During the recess we had filed a motion with the Supreme Court, asking for an order directing this Court to grant us an opportunity, a meaningful opportunity, to present evidence in mitigation.

And in support of that request, I would like to clarify my offer of proof. I would like the opportunity to present live witnesses to rebut some of the facts found in aggravation concerning the character and handicapped nature of the victim. Also, the defendant's character. Also, the defendant's regard for life.

And we would like to repeat the testimony of Doctor John Stoner concerning the defendant's lack of ability to conform his conduct to the requirements of the law of self-defense to the extent he did exceed the right of self-defense and, probably most importantly, we would [p. 33] like the opportunity to present evidence both from Doctor Stoner and from the spiritual advisers of the defendant and other people who have been around him to describe the changes in the defendant's character that have occurred since the time the last sentence was imposed.

The Supreme Court Clerk took our motion upstairs and it is under advisement by the Supreme Court. But in the meantime, there is no stay ordered that we are aware of. So I guess the Court isn't violating any orders by proceeding ahead. But we would for the record object to proceeding ahead, at least until they decide the motion.

THE COURT: The motion is denied.

The record will then show that the defendant, Mr. Creech, is personally present in court, is represented by his attorney, Mr. Kehne, who is also present. The state of Idaho is represented by Mr. Greg Bower, Prosecuting Attorney of Ada County, Idaho.

Heretofore, Mr. Creech, this Court did inform you that the prosecuting attorney of this county had filed in this court an Information against you charging you with a certain crime or crimes against the laws of the State of Idaho.

[p. 34] At that time and throughout these entire proceedings, your attorney has been present and acting in your behalf. Upon inquiry you informed the Court that Thomas Creech is your true name.

A copy of the Information was given to you and you through your attorney waived its reading to you.

You were advised that you were entitled to a reasonable time within which to consider and enter your plea and also that you could waive that time.

Thereafter, you answered that you were guilty of the offense of First Degree Murder charged against you. You were fully advised of the consequences of your plea of guilty and of your various rights if you plead not guilty.

After considerable questioning, this Court determined that your plea was freely, voluntarily and constitutionally entered and the Court accepted your plea of guilty.

A presentence report was ordered. The report was returned and a copy was furnished to your attorney.

And of course, we have gone through long hearings in regard to this matter.

Today is the day then fixed as the time for pronouncement of judgment and sentence against you in accordance with the remand directions of the Idaho [p. 35] Supreme Court.

And in that regard, Mr. Kehne, do you have anything you would like to say on behalf of your client?

MR. KEHNE: Your Honor, we would, as part of this arraignment for sentence, inform the Court that there is legal cause why judgment should not be pronounced against the defendant;

First of all, because the statute under which he is prosecuted is unconstitutional by shifting the burden of persuasion on the death sentence to the defendant by saying unless mitigation outweighs statutory aggravation, then the sentence shall be death. That is unconstitutional;

By failing to provide for jury participation in the sentencing process, as we have outlined in our demand earlier today;

By having in it the unconstitutional aggravating factors of the propensity to commit murder which will probably constitute a continuing threat to society;

By having the unconstitutional aggravating factor of utter disregard for life, which is vague and overbroad and fails to channel discretion and applies to virtually every single First Degree Murder;

And the fact that there is lack of competent [p. 36] proof adduced by live witnesses subject to cross examination of any circumstances in aggravation.

Also, we would submit that it was an abuse of this Court's discretion to accept the defendant's guilty plea over the objection of his counsel at a time when he was obviously suicidal for a case that would probably merit the death penalty.

We would also submit that there is no factual basis for finding the defendant guilty of Murder in the First Degree, nor is there any factual basis to support the guilty plea in this case;

And that the Court has specifically found that David Jensen without provocation attacked Tom Creech before his death. That alone, the fact that he was initially justified in defense himself against this deadly-force attack, makes the crime guilty of manslaughter rather than any degree of murder.

THE COURT: All these motions are denied.

Do you have any other statements you would like to make on behalf of your client?

MR. KEHNE: No, Your Honor.

THE COURT: Mr. Bower, do you have anything that you would like to say on behalf of the State of Idaho?

MR. BOWER: No, Judge.

THE COURT: Very well. There being nothing [p. 37] further to bring to the attention of the Court, again for the record, I will affirm my findings heretofore

entered and I will order, adjudge and decree that the defendant, Thomas Eugene Creech, is guilty of the crime of Murder in the First Degree, 18-401 and 18-403 of the Idaho Code;

And that he be sentenced on this charge to be punished by death by the Idaho State Board of Correction on April 29th, 1983 at 9 o'clock a.m. in the manner prescribed by law.

And the defendant is remanded to the Idaho State Board of Corrections until his sentence is executed. And I will give the sheriff 24 hours to remove him from the same.

MR. KEHNE: Your Honor, we would ask the Court to order that the defendant be allowed to remain with the sheriff, if that is agreeable to all parties.

My understanding is, the warden doesn't object to that. I have talked to sheriff Palmer today and he doesn't object to that, he doesn't mind that.

We would request that he be allowed to stay there. I believe it is in accordance with he law. If the Board of Corrections doesn't object to it, then my understanding is, they have changed their position since the change of management over there and that it is okay with them.

[p. 38] THE COURT: Mr. Bower, do you have any comments you would like to make in that regard?

MR. BOWER: We heard of nothing from the warden. If what counsel says is true, the sheriff's position is he will accept any lawful order of this Court.

THE COURT: Well, I have never had any objections, Mr. Creech, to allowing you to remain in the Ada County Jail. It's just the statute's rule otherwise and I gather the Board of Correction can make any appropriate motion they wish.

And so I will order that the defendant may remain in the Ada County Jail until his sentence is to be executed.

Is there anything further that should be brought to the attention of this Court?

MR. KEHNE: Judge, I would like to say one thing to make the record unmistakably clear. When the Court gave me the opportunity to argue anything further and by my saying that I have nothing else to present, I meant of course only argument. And I did not intend to waive or desire to produce mitigating evidence as I stated before.

THE COURT: I think the record would certainly note that. At least I understood it in that manner, Mr. Kehne.

Anything further?

[p. 39] MR. BOWER: Does the Court desire preparation of the death warrant with respect to sentence?

THE COURT: Yes. I will direct you to do so. And did you get that date then?

MR. BOWER: I did, Your Honor.

THE COURT: Very well. Then it is so ordered. Court is in recess.

(The matter concluded at 10:50 a.m.)

[p. 40] REPORTER'S CERTIFICATE

I, DIANNE E. CROMWELL, Official Court Reporter of the Fourth Judicial District, County of Ada, State of Idaho, hereby certify:

That I am the person who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing Reporter's Transcript contains a full, true and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this 31st day of March, 1983.

/s/ Dianne E. Cromwell
DIANNE E. CROMWELL,
Official Court Reporter

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, vs. A. J. ARAVE, Warden, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, and JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	CIVIL CASE NO.___

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

TO: The Honorable ___, Judge of the District Court for the District of Idaho:

1. The name and location of the court which entered the judgment of conviction under attack are:

A. The Fourth Judicial District Court of the State of Idaho, in and for Ada County.

B. Boise, Ada County, Idaho.

2. The date of the judgment of conviction is January 25, 1982. While Petitioner's appeal was pending, the death sentence passed down January 25, 1982 was vacated and the State Supreme Court ordered resentencing. Petitioner was resentenced to death on March 17, 1983.

3. The sentence is that Petitioner, Thomas Creech, be put to death by firing squad or by intravenous injection in the discretion of the Idaho State Board of Corrections.

4. The nature of the offense involved is that Thomas Creech was charged with murder in the first degree in violation of Sections 4001, 4002, and 4003(c) and (e), of Title 18 of the Idaho Code, in that he allegedly did kill one David Jensen with malice aforethought when both Tom Creech and David Jensen were inmates of the Idaho State Correctional Institute and while Tom Creech was serving a life sentence for murder.

5. Petitioner, Thomas Creech, originally pled not guilty, but changed his plea to guilty on August 28, 1981.

6. There was no trial of the issues of guilt or innocence, and the trial of aggravating and mitigating circumstances of the sentence was had before the court sitting without a jury.

7. Petitioner, Thomas Creech, testified at the trial of the issue of sentence.

8. Petitioner, Thomas Creech, appealed his conviction and death sentence.

9. The facts of Petitioner, Thomas Creech's, appeal are as follows:

A. The Supreme Court of the State of Idaho, by order dated the 24th day of February, 1983, retained jurisdiction of Petitioner's appeal, but vacated the Petitioner's death sentence and ordered resentencing to occur before April 4, 1983. Resentencing occurred March 17, 1983 at the trial court level. The Supreme Court of the State of Idaho affirmed the judgment and sentence of the trial court on May 23, 1983 in *State v. Thomas Eugene Creech*, 105 Idaho 326 (Justices Huntley and Bistline filed dissenting opinions starting 105 Idaho at 375).

B. The Supreme Court of the State of Idaho denied Petitioner Thomas Creech's Petition for Rehearing on September 21, 1983.

C. The Supreme Court of the United States denied Petitioner Thomas Creech's Petition for Writ of Certiorari on February 21, 1984, ___ U.S. ___, 104 S.Ct. 1327 (Marshall and Brennan, dissenting).

10. Other than the appeal described in Paragraphs 8 and 9 above, the only petitions, applications, motions or proceedings filed or maintained by Thomas Creech with respect to the judgment of January 25, 1982 and the resentencing which occurred March 17, 1983 of the Fourth Judicial District Court of the State of Idaho, are those described in Paragraph 11 below.

11. A. On May 19, 1983, a motion to arrest judgment and to withdraw guilty plea was filed by counsel on behalf of Petitioner Thomas Creech. On June 24, 1983, Petitioner's motion to withdraw his guilty plea was denied, as was his

request for a hearing on his motion to withdraw guilty plea.

B. Petitioner Thomas Creech appealed the denial of a hearing on his motion to withdraw guilty plea and the denial of his motion to withdraw guilty plea on June 24, 1983. That appeal was subsequently dismissed by the Idaho Supreme Court.

C. Petitioner Thomas Creech renewed his motion to withdraw guilty plea and that motion and others were set for hearing commencing February 21, 1984. The district court denied Petitioner's motion to withdraw his guilty plea by order dated March 6, 1984. In spite of Petitioner's specific request for findings of fact and conclusions of law, none were issued by the district court in support of its order denying the motion to withdraw guilty plea. (A copy of that order is appended as an exhibit.) Petitioner Thomas Creech appealed the denial of his motion to withdraw guilty plea and the Idaho Supreme Court affirmed in an opinion reported at ___ Idaho ___, Appeal #15475 rehearing denied December 31, 1985.

D. The district court issued a death warrant on January 10, 1986, ordering Petitioner's execution February 3, 1986.

12 Petitioner Thomas Creech's conviction and sentence were obtained and imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States for each of the reasons to be set forth fully below.

INTRODUCTION

13. Petitioner Thomas Creech specifies each of the grounds on which he relies in support of his contention that his conviction and sentence are illegal under the United States Constitution, and briefly summarizes the facts in support of his contentions. This description is not intended to be final or exhaustive. Petitioner requests the opportunity for more exhaustive briefing, further evidentiary hearing, and further discovery in Federal District Court.

INTRODUCTORY FACTS

14. At the time of the offense, both Mr. Creech and the victim David Jensen were inmates of the maximum security tier of the Idaho State Correctional Institution. (P.H. Tr., P. 34, L. 14, 21-22) On that tier Mr. Creech was janitor (P.H. Tr., p. 48, L. 13-17), which enabled him to stay out of his cell more than the other inmates. Although Mr. Creech gave more than one version of the events leading up to Mr. Jensen's death (*see* testimony of E.C. "Chuck" Palmer, P.H. Tr. p. 71-90) the version most consistent with Mr. Creech's psychological profile (Tr. Vol. II, p. 221, L. 11-24; p. 218-219, L. 10-13) and found as fact by the sentencing court, is that the violence started with the unprovoked attack on Mr. Creech by the victim, Jensen. "That the Defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was inititally justified in protecting himself." (R. Idaho Supreme Court #14480, p. 56, Ls. 10-13.)

15. On the day of his death, Mr. Jensen made two attacks on Mr. Creech. In the first he attacked while

armed with a battery-filled sock. Mr. Creech disarmed Jensen. Jensen later attacked again, this time with a home-made knife composed of a razor blade and a toothbrush. (Tr. Vol. II. p. 218, L. 11-25.) This attack by Jensen cost him his life. In the course of defending himself, Mr. Creech hit Jensen with the battery-filled sock Petitioner had taken from Jensen earlier. There is no reason to believe Mr. Creech knew it beforehand, but a large portion of Jensen's skull had been replaced with a plastic known as cranioplasty material which is much more subject to fracture than is human bone. (P.H. Tr., p. 22, L. 11-24.) In fact, the force of Mr. Creech's blows may well not have caused death in any individual with a normal skull. (P.H. Tr., p. 29, L. 17; p. 30, L. 22.)

16. While the district court found that Mr. Creech was initially justified in defending himself (R. p. 56, L. 10-13), the court also found that his response "went well beyond self-defense". (R. p. 56, L. 20-17.) According to the testimony of psychologist Dr. John Stoner, during the course of his defense against Jensen's attack, Mr. Creech lost both the capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. (Tr. Vol. II, p. 219, L. 6-25.) The district court found the Petitioner's response to Jensen's attack evidenced "an excessive, violate rage" (R. p. 56, L. 23). The state offered the testimony of Dr. F. Lamarr Heyrend at sentencing. Dr. Heyrend opined that Petitioner was sane when he evaluated Petitioner years before and sane the day of the hearing, but offered no testimony to contradict Dr. Stoner's opinion of Petitioner's lack of capacity at time of the acts charged. (Tr. Vol. II, P. 119-42.)

GROUNDS OF CONSTITUTIONAL INVALIDITY OF PETITIONER'S CONVICTION AND SENTENCE

A. The invalidity of Petitioner's guilty plea under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the need for discovery and an evidentiary hearing in federal court.

17. The conviction and death penalty in this case rest upon Petitioner's plea of guilty entered August 28, 1981 over the objection of his counsel. In any case the constitutional requirements of a valid guilty plea are that it be knowing, intelligent, voluntary, and entered with the effective assistance of counsel.

18. Petitioner's guilty plea meets none of these requirements. Petitioner's guilty plea ultimately resulted in his death sentence. The United States Supreme Court has repeatedly said there is a special requirement for greater reliability and procedural exactitude in cases which result in capital sentences. See, e.g., *Eddings v. Oklahoma*, 102 U.S. at 872 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Gardner v. Florida*, 430 U.S. 349, 557-59 (1977), *Id.* at 363 (White, Justice concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

19. At the time Petitioner entered this particular guilty plea, he did not understand the nature and elements of the offense charged. Acceptance of the guilty plea under this circumstance and the conviction entered thereon, violate the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner further did not understand he had any possible defenses, and at the time of his guilty plea did not knowingly intend to waive any defenses. It later developed he had two defenses: A

required element, malice, was negated by the sudden quarrel instigated by the victim without provocation; and, at the time and to the extent Petitioner exceeded the lawful bounds of self-defense, he was without capacity to conform his conduct to the requirements of law due to mental disease or defect. A conviction based on such a plea is invalid and violative of the Fifth and Fourteenth Amendments to the United States Constitution, and a death penalty based thereon violates the Eighth and Fourteenth Amendments to the United States Constitution.

20. Petitioner's guilty plea was not voluntary in the sense that it was motivated partly by vague but ominous phone calls to family members Petitioner understood to be death threats to be carried out if he went to trial. It was also unvoluntary in that it was motivated partly by a suicidal depression caused by improper medical care furnished to Petitioner by his state custodians.

21. Petitioner was denied the effective assistance of counsel up through the time his guilty plea was entered, in violation of the Sixth and Fourteenth Amendments to the Constitution.

FACTS SUPPORTING PETITIONER'S CLAIM THAT HIS GUILTY PLEA AND RESULTING CONVICTION AND SENTENCE ARE CONSTITUTIONALLY INVALID

22. Petitioner's first state court appearance on these charges occurred during his Magistrate Division arraignment, May 18, 1981, during which he was appointed the Ada County Public Defender's Office. There was a single deputy public defender present to represent Mr. Creech

and all other prisoners appointed counsel that day. That deputy public defender was not the deputy ultimately assigned to represent Petitioner. He spoke with Petitioner about the impossibility of bail and the setting of a preliminary hearing, but refused to talk about the facts of the case or to explain the nature or elements of the crime charged.

23. Petitioner first met the attorney assigned to handle his case at the time set for preliminary hearing, May 29, 1981. Petitioner spoke only briefly with counsel before the commencement of the hearing, but again, not about the elements of the crime or the evidence against Petitioner. Counsel informed Petitioner he would seek to vacate the hearing and continue it to a future date because (1) the state had not complied with discovery and he was not prepared to conduct the hearing, (2) the public defender's office had an unresolved conflict of interest in the case in that the police were attempting to make deals for testimony with other public defender clients. At the time set for commencement of the preliminary hearing, counsel for Petitioner did make that motion to vacate on those grounds, but the motion was denied and Petitioner was forced to his preliminary hearing over his objections made through counsel.

24. At his original district court arraignment, Petitioner Thomas Creech pleaded not guilty and the matter was set for jury trial. However, in a letter dated August 26, 1981, written by Petitioner to the trial judge, Judge Newhouse, delivered to the trial judge with no prior notice to Petitioner's counsel, Petitioner asked that he be brought into court so that he might plead guilty, suicidally expressing the desire that he be executed

promptly. In response to this letter, the trial judge brought Petitioner into court August 28, 1981.

25. During this period, and for several months afterward, Petitioner was intermittently suicidal. Part of the reason Petitioner was depressed during this period is medical. He suffers from endogenous depression and must be maintained on a consistent regimen of antidepressant medication. During the pendency of the proceedings before the trial judge, the state medical personnel at the jail where Petitioner was incarcerated frequently interrupted and changed his antidepressant medication. This inadequate medical care by the state contributed toward Petitioner's desire at the time to plead guilty and to receive the death penalty.

26. Between the time Petitioner's counsel was notified of the trial court's intent to entertain Petitioner's guilty plea and the actual hearing on the guilty plea, Petitioner conferred with his counsel only a brief time outside the courtroom in an unused jury room. At this time, counsel unsuccessfully attempted to convince Petitioner to postpone his guilty plea, but did not have time to explain to Petitioner the elements of the offense or what possible defenses he may be waiving by pleading guilty.

27. At no time before the entry of his guilty plea on August 28, 1981 had Petitioner and counsel discussed elements of the crime. And at the time of his plea, Petitioner did not understand those elements. Specifically, Petitioner did not understand the concept of malice. He mistakenly believed that because he was a life sentence

prisoner and because his alleged victim was also a prisoner, any killing would be murder in the first degree, regardless of mental state.

28. The only discussion of murder and its elements at the time of the plea, consists of: Tr. Idaho Supreme Court #14480, Vol. I, p. 61, L. 11-16:

> "Q: What, as you understand it, does a person have to do to be guilty of the charge of first degree murder? What does it mean to you?
>
> "A: He has to think about doing it.
>
> "Q: And killing someone?
>
> "A: And killing someone."

29. That record woefully falls short of the requirements of due process. Nowhere is there a discussion of malice. One element of murder is malice:

> *"Idaho Code Section 18-4001. Murder Defined.* Murder is the unlawful killing of a human being with malice aforethought . . . "

An intentional killing "upon a sudden quarrel or heat of passion" is not murder, but is voluntary manslaughter.

> *"Idaho Code Section 18-4006. Manslaughter Defined.* Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds: (1) voluntary upon a sudden quarrel or heat of passion. • • • "

30. There is support elsewhere in the record for Petitioner's contention that he is not guilty of first degree murder. In the course of his findings in considering the death penalty, the trial court found as fact "[t]hat the defendant did not instigate the fight with the victim, but

the victim, without provocation, attacked him. He was initially justified in protecting himself." That court went on to find, in aggravation, that the "violent actions of the defendant went well beyond self-defense." These findings of the sentencing court make Petitioner's crime not first degree murder, but rather voluntary manslaughter under Idaho law. A crime for which the death penalty is not authorized.

31. Because of improper medical care and other factors, Petitioner was suicidal and therefore wanted to plead guilty and be sentenced to death promptly. The actions and timing of the trial court caused the ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The court insinuated itself between the then suicidal Petitioner and his counsel, first by entertaining the change of plea with virtually no advance notice to defense counsel, and then by denying counsel any meaningful opportunity to discuss with Petitioner his rights, defenses, and the elements of the crime.

32. The day the trial court entertained Petitioner's plea, Petitioner's counsel objected strenuously to the hearing and the plea and made it clear that the plea was being entered over counsel's objections and without his consent. When these actions failed, Petitioner's counsel moved for a five day continuance in order to consult his client and other attorneys more experienced in death defense work. The trial courts left the decision of the continuance up to the then obviously suicidal Petitioner, who preferred to go ahead with his guilty plea on that day. The motion for continuance was denied. As of this

point in the process, the trial court was allowing Petitioner to represent himself.

33. There is a constitutional right to self representation. *Faretta v. California*, 422 U.S. 806. That right is not absolute, however. The facts in *Faretta* demonstrate the kind of procedure which should be followed before allowing a defendant to represent himself. The *Faretta* inquiry requires a court to warn the defendant of the perils of self-representation and to ascertain on the record whether the defendant has sufficient knowledge, skill and understanding to represent himself consistent with the due process requirements of the Fifth and Fourteenth Amendments. *Faretta*, 422 U.S. 807-08 (1975).

34. It is particularly important to conduct a *Faretta* inquiry in capital cases where the capital defendant is openly, obviously and publicly suicidal. There is a grave threat to the integrity of judicial process when the basis for a capital defendant's conviction is his guilty plea entered while he is obviously suicidal. This is well demonstrated in Petitioner's case. Based on the sentencing court's findings, Petitioner is guilty only of a non-capital offense, manslaughter, as discussed above. He may not be guilty of any offense resulting from this homicide, as shown below.

35. At the time Petitioner was allowed to plead guilty over the objection of his counsel, counsel was having Petitioner evaluated by a psychologist and those evaluations were not yet completed. Ultimately, those evaluations resulted in the psychologist's opinion that at the time he exceeded the lawful bounds of self-defense, Petitioner's actions resulted from an autonomous, self-

perpetuating rage, and that at the time of those otherwise illegal actions, Petitioner was unable to appreciate the wrongfulness [of] his conduct, or to conform it to the requirements of law, due to mental disease or defect.[1] This evidence, if believed, would require a jury to acquit Petitioner of the offense with which he was charged, and of all lesser included offenses. (The district judge had actual notice that psychological examinations were being conducted. Tr. #13380, p. 43, ls. 10-16.)

36. Petitioner did not knowingly waive either defense – reduction to manslaughter from lack of malice or his insanity at the time of his acts – when he was allowed to plead guilty over his counsel's objection.

37. The district court allowed Petitioner to enter his uncounseled guilty plea because of a misapprehension about the law: There is no right to plead guilty to a capital offense. Under all these circumstances, it was error for the court to entertain Petitioner's request to change his plea. The public's interest in maintaining the integrity of its judicial system is too great to countenance death sentences predicated on the guilty pleas of suicidal capital defendants who are allowed to plead guilty over objection of defense counsel and who do not appreciate the elements of the charges or their possible defenses.

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[1] Idaho has since abrogated the defense of insanity. At the time of the offense charged against Petitioner, insanity was a viable defense in this state. See Idaho Code Section 18-207: "*Mental Illness as Defense.* 1. A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

38. Petitioner's family received vague but ominous threats which Petitioner and his family perceived to be contingent upon whether Petitioner asserted his rights to a trial. Petitioner believed these anonymous contacts were inspired by those who would be injured by a public trial involving, as this necessarily would, reports of the unseemly happenings on a maximum security tier and the events leading up to alleged victim, David Jensen's death – including how Jensen got the deadly instruments he used on his two attacks on Petitioner the day Jensen died. These threats prevent Petitioner's guilty plea from being voluntary.

39. Another circumstance undermining voluntariness of the guilty plea is Petitioner's depression illness. Eudogenous depression sickness is a long-term ailment, but its symptoms – depression, malaise, indifference, self-destructiveness and suicidal ideation – can be controlled by proper medication. Petitioner had been diagnosed as suffering from depression sickness and had been on anti-depressant medication.

40. The medications which are used to control depression do not work immediately. Depending on the individual patient and the medication, they are not effective for up to more than twenty days of continuous administration. This waiting period of ineffectiveness does not overlap perfectly among the various types of antidepressants prescribed. Taking one medicine for a week will not necessarily shorten the waiting time of ineffectiveness of a second medication by one week.

41. During the period before and after his guilty plea Petitioner's medication was being switched from

time to time and he went without any antidepressants at all for several days at a time. Petitioner believes the predictable result of this improper medical care is the suicidal depression he suffered, expressing its symptoms in his wish to plead guilty and be sentenced to death, in his feelings his family would be better off with him dead (even if they weren't being threatened) and in his unreceptiveness to those who wished to help him save himself.

THE EFFECTS OF DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL ON THE VALIDITY UNDER THE UNITED STATES CONSTITUTION OF PETITIONER'S GUILTY PLEA

42. There are several reasons why Petitioner had not been adequately counseled up until the date he was allowed to plead guilty over the request of his counsel for more time to confide in his client. One is that there was virtually no advance notice that the court would entertain a guilty plea, thus making it impossible for counsel to have a meaningful opportunity to talk to Petitioner before the plea. Another is that the deputy public defender assigned to represent Petitioner was pressed by other cases during the pendency of Petitioner's case up through August 28th, when Petitioner was allowed to plead guilty.

43. Petitioner's counsel actually went through jury trials on one robbery (*State v. Triggs*, commencing July 21, 1981), one arson (*State v. Montoya*, commencing July 28, 1981), one assault with intent to commit murder (*State v. Manchester*, commencing August 20, 1981 and lasting over

one week), and he prepared two other first degree murder cases for trial. (*State v. Parrott*, which was settled shortly before trial, and *State v. Sivak*, another capital case, which actually was tried, commencing September 14, 1981).

44. Up until the time of the plea, Petitioner and his assigned counsel had very little contact. The effect of the district court's denial of the continuance before entertaining the plea was that the plea was uncounseled, unknowing, and unintelligent, and in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

45. Petitioner did not understand the elements of murder. He did not recognize that he had the defense (shown in the sentencing court's own findings) of heat of passion and sudden quarrel which negate malice and reduce the crime to manslaughter. Counsel had not yet developed the defense of insanity later shown in the uncontradicted testimony of Dr. John Stoner at the sentencing hearing.

PETITIONER WAS NEVER GIVEN A FULL AND FAIR HEARING IN STATE COURT TO ATTACK HIS GUILTY PLEA

46. After his direct appeal, Petitioner filed a post conviction motion to arrest judgment and to withdraw his guilty plea. He was not provided a full and fair hearing on his claims in state court in two respects. First, he was not given adequate time to prepare for the hearing or to conduct discovery, and he was denied expert assistance. Second, the state courts refused to enter any findings of

fact or conclusions of law in response to Petitioner's many challenges and extensive evidence.

INADEQUATE PREPARATION TIME

47. Immediately following remand of the case, the state district judge issued an order, apparently on the court's own motion, which did away with the statute of limitations for post conviction relief actions and the law of limitations of actions of the state habeas corpus remedy. The order, dated January 24, 1984, set February 21, 1984 as the date to commence the last of all hearings ever to be held in the case in Idaho district court. The order specifically provided that any matter not filed by February 6, 1984 would be deemed waived. Petitioner objected to that order and informed the district court that he would not have sufficient time to consider which issues to raise or to prepare for a hearing. He was given no relief from the the [sic] effect of that order.

48. Petitioner believes the lack of preparation prevented him from discovering and interviewing the eyewitnesses to the alleged crime, discovering their current whereabouts and the contents of their institutional jackets and results of interviews with them. Petitioner believes that undertaking these basic actions in preparation will enable him to establish that Jensen did, in fact, twice try to kill Petitioner the day he (Jensen) died, that Petitioner is not guilty of a capital offense, and that someone at the penitentiary was responsible for the vague but threatening phone calls his mother received which contributed to his desire to plead guilty.

49. Petitioner believes the lack of preparation prevented him from developing a psychiatric defense fully. All he was able to do in the time allowed was reintroduce the testimony given at his sentencing trial. Thirty days is simply not an adequate time to produce a solid psychiatric defense.

50. The lack of preparation time and expert assistance also prevented Petitioner from developing an adequate record about his inadequate medical care and how it influenced him to plead guilty. Petitioner believes that if given adequate time and expert assistance he can establish that he has endogenous depression sickness which requires a steady, daily treatment with antidepressant medication. Petitioner believes that he can establish, given time, assistance and opportunity, that the care given him by his state custodians was medically inadequate and and [sic] that the predictable result of such mistreatment is a suicidal "bent for self destruction" (*see*, the dissenting opinions of Justices Huntley and Bistline in Petitioner's direct appeal in state supreme court) and unreceptiveness to those, such as his lawyer, who wished to help him.

ABSENCE OF ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW.

51. By reintroducing testimony from earlier parts of the proceedings and presenting live testimony at the hearing Petitioner introduced evidence on each of his many factual allegations attacking his guilty plea. The state trial judge denied the post conviction motions with

no findings of fact or conclusions of law, in spite of Petitioner's explicit request for them.

52. Petitioner submits that the absence of findings of fact and conclusions of law is inconsistent with the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and is inconsistent with the Eighth Amendment requirement of reliability in the determination of who shall receive the death penalty.

53. The lack of findings and conclusions in the record makes impossible a meaningful appellate review in the State supreme court. Without findings or conclusions there is no way for a reviewing court to determine whether the lower court relied on inadmissible evidence in making its findings of fact, whether it abused its discretion in its rulings on credibility or whether it even applied the correct rule of law.

54. In Idaho, the standard for whether a guilty plea may be withdrawn is whether "manifest injustice" has been shown. The meaning of the term "manifest injustice" is unclear in previous Idaho case law. For instance, it is unclear whether a defendant must prove his innocence.

55. It is possible, on this record, that the state district judge denied Petitioner's motion to withdraw the guilty plea because he believes execution of this Petitioner is not manifestly unjust even if he is innocent of the crime with which he was charged and for which he was sentenced. The error was compounded in the State supreme court. That court also refused to enter any findings of fact.

56. The Petitioner is entitled to an evidentiary hearing, briefing and argument in federal court because he was not given the adequate preparation necessary to a full and fair hearing in state court to challenge his guilty plea and because there are no state court findings in this record which are necessary to a full and fair review.

B. Constitutional defects in Idaho death penalty statutory scheme.

1. Idaho's statutory death penalty scheme abridges capital defendants' jury trial rights under the federal Constitution.

57. Petitioner Thomas Creech was denied any jury involvement in the capital sentencing trial. After his guilty plea, but before sentencing, he explicitly demanded a jury trial on aggravating circumstances, and specifically on the trial of the issue of whether or not he had the specific intent to kill or premeditation.

58. Idaho's statutory death penalty scheme provides for no participation by a jury in the sentencing process. The United States Supreme Court recently decided there is no right to jury involvement in the *weighing* process of a capital sentencing trial, i.e. passing the actual sentence. There is no United States Supreme Court case approving Idaho's practice of removing the trial of aggravating circumstances from the province of the jury. This issue is currently pending before the Ninth Circuit en banc. See *Adamson v. Rickett*, 758 F.2d 441 (9th Cir. 1985) rehearing en banc granted, 764 F.2d 1343 (9th Cir. 1985).

59. The crime for which Petitioner Thomas Creech was prosecuted requires neither premeditation nor the

specific intent to kill. It is first degree by virtue of his status as a life sentence prisoner and the status of his alleged victim as a fellow prisoner. However, these circumstances, when coupled with the specific intent to kill, become statutory aggravating circumstances which can elevate the crime from non-capital first degree murder to capital first degree murder. Idaho Code Section 19-2515(f)(7).

60. The existence of a specific intent to kill has traditionally been a jury question. The Idaho statutory scheme has removed that question from the province of the jury and made it solely a matter for the sentencing judge's determination. Removal of this issue from the province of the jury and removal of the trial of the existence of all statutory aggravating circumstances from the province of the jury violates the Sixth and Fourteenth Amendments to the United States Constitution.

2. The Idaho death penalty scheme places the burden of proof (or the risk of non-persuasion) upon defendants, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

3. Idaho Code Section 19-2515(b) provides:

> "Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court *shall* sentence the defendant to death unless the court finds that mitigating circumstances which may

> be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." (Emphasis added.)

This issue of unconstitutional apportionment of the burden of proof is currently being reviewed by the Ninth Circuit Court en banc in *Adamson v. Rickett*, supra.

C. The sentencing hearing was conducted in an unconstitutional manner.

FINDINGS BASED ON UNATTRIBUTED, UNCORROBORATED AND UNRELIABLE HEARSAY

61. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution demand that the trial of aggravating and mitigating circumstances be held upon evidence whose reliability is guaranteed by rules of evidence and cross-examination or, at the least, a meaningful opportunity to rebut.

62. In this case, the voluminous record relied on by the sentencing judge included everything in his files, including letters and other presentence material. The presentence report which was considered (over Petitioner's objection) in the trial of aggravating circumstances contained a great deal of hearsay, much of which is uncorroborated or even unattributed, with no guarantee of reliability. That presentence report even included newspaper articles and editorials about this particular Petitioner. The presentence report was voluminous, more readily measured in inches than in pages. Petitioner had no meaningful opportunity to rebut this evidence, or to know upon which evidence the sentencing court relied in making its findings. This violates the due process clauses

of the Fifth and Fourteenth Amendments and the need for reliability expressed in the Eighth and Fourteenth Amendments to the United States Constitution.

D. The Idaho courts improperly found the statutory aggravating circumstance that Petitioner exhibited the "utter disregard for humam [sic] life".

63. This statutory aggravating circumstance found in Idaho Code Section 19-2515(f)(6) is unconstitutionally vague on its face. It provides "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313 (White, Justice concurring). Before Petitioner's sentencing, the Idaho Supreme Court attempted to narrow that aggravating circumstance in *State v. Osborn*, 102 Idaho 405 (1981), with the limitation that it apply to "acts or circumstances surrounding the crime which exhibit the highest, the most callous disregard for human life, i.e., the cold-blooded, pitiless slayer. Petitioner submits that the "utter disregard" circumstance is still too vague to channel the sentencing authority's discretion adequately.

64. Even if the federal courts rule that the *Osborn* case sufficiently narrows the "utter disregard" statutory aggravating circumstance, the Idaho courts committed constitutional error in applying that circumstance to Petitioner.

65. *Osborn* requires a "cold-blooded slayer" for that aggravating circumstance to apply. The court below, however, found that in the present case, the killing evidenced "an excessive violent rage". "Cold-blooded" connotes lack of emotion and is totally inconsistent with excessive

rage. The *Osborn* definition of Section F(6) (the "utter disregard" circumstance), is also inconsistent with the finding of the sentencing court "[t]hat the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself." Petitioner is entitled to have the federal court review and overturn this finding of a statutory aggravating circumstance. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court upheld a statutory aggravating circumstance as previously limited in Georgia court opinions but overruled the Georgia courts in applying the circumstance in that particular case.

E. The sentencing court found and weighed two non-existent statutory aggravating circumstances, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

66. The statutory aggravating circumstances found by the sentencing court and complained of here are:

> (A.) The murder was defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (c). The Petitioner was under a sentence for Murder of the First Degree at the time of his actions.
>
> (B.) The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (e). The Petitioner committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.

67. Those two circumstances are what elevate Petitioner's crime from murder to first degree murder. Idaho

Code Section 18-4003(c)(e). They are not found in the list of statutory aggravating circumstances in Idaho Code Section 19-2515. The district court erred by not noticing that those circumstances are statutory aggravating circumstances only when coupled with a finding of a specific intent to kill beyond a reasonable doubt. The inclusion of these non-existent statutory aggravating circumstances in the weighing process against mitigating circumstances violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

• • •

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he lacked substantial capacity to conform his conduct to the requirements of law due to mental disease or defect. This refusal to consider proffered mitigating evidence violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and the doctrine of *Eddings v. Oklahoma*, 102 S.Ct. at 872 (1982).

F. Both Petitioner's sentencing trials were conducted in an unconstitutional manner and his sentence is based upon unreliable, often unattributed hearsay he had no meaningful opportunity to rebut or challenge through cross-examination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

FACTS SUPPORTING PETITIONER'S CLAIM THAT HIS DEATH SENTENCE IS BSED [SIC] ON EVIDENTIARY RULES AND ON PROCEDURES WHICH VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

68. Petitioner's first sentencing trial was held January 11, 1982. The sentencing court received evidence and

argument but passed no sentence at that time, instead taking the matter under advisement. The court later issued its findings, judgment of conviction, report and imposition of death penalty and death warrant January 25, 1982. Neither Petitioner nor counsel was present because the sentencing judge filed these findings and notified Petitioner by service. Petitioner successfully argued during his direct appeal in state courts that the sentence passed January 25, 1982 was void, for sentencing Petitioner *in abstentia* violated Idaho statutes and criminal rules. (The Idaho supreme court did not reach the constitutional issue.)

69. The state supreme court did not issue an opinon [sic] and remand the case at the time it made that ruling. Instead, the supreme court retained jurisdiction of Petitioner's appeal, vacated Petitioner's death sentence and ordered the sentencing judge to hold a new sentencing hearing.

THE FIRST SENTENCING TRIAL – JANUARY 11, 1982.

70. The sentencing court relied on unreliable information at the first sentencing trial. Over Petitioner's objection, the sentencing judge included in the sentencing record everything that had been submitted to his file, including letters, messages, and a voluminous presentence investigation report containing great amounts of hearsay, much of which was corroborated or even unattributed. It even included several newspaper articles about Petitioner and the circumstances of the crime and a local newspaper editorial about Petitioner personally. The presentence report contained reports of psychologists,

psychiatrists and physicians from Idaho and even from Oregon and Ohio, whom Petitioner had no meaningful opportunity to confront or to cross-examine.

71. This type of material would never be admitted in a trial of guilt or innocence, whether that trial was held before a jury or a court. Supreme Court cases have held that the need for reliability in a capital sentencing trial is no less than for a trial of guilt or innocence. The Supreme Court has recognized that a capital sentencing proceeding at which aggravating circumstances are determined and measured against mitigating circumstances is, for practical and constitutional purposes, a trial. E.g. *Bullington v. Missouri*, 101 S.Ct. 1852 (1981).

72. The danger inherent in relying on sentencing records such as those in Petitioner's case stems from the unreliability of the information. Petitioner has had no meaningful opportunity to cross-examine, challenge or rebut the information in the sentencing record. The sentencing judge gave no indication about which information was being considered or about which was ruled credible and which not and why. Given a presentence investigation that is more easily measured with a ruler or a scale than in number of pages, Petitioner had no meaningful opportunity to rebut the unreliable information therein. Petitioner bases his objections to reliance on informal material at his capital sentencing trial upon his rights to due process, to confront and cross-examine his accusers, to have his sentence determined by reliable information and in accordance with procedures embodied in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

73. Thomas Creech's challenge to the use of such unreliable information at his sentencing trial is not frivolous. His view places him in the good company of the Eleventh Circuit Court of Appeals and the two dissenting opinions of Justices Huntley and Bistline on Petitioner's direct appeal to the Idaho supreme court.

74. The substantiality of this claim is demonstrated by reviewing the enormous amounts of hearsay, unattributed information, newspaper articles and other information admitted into Petitioner's sentencing trial.

75. Petitioner's claims entitle him to resentencing. A stay is required for a full consideration and contemplation of his claims.

76. The sentencing court's reliance on informal information prejudiced Petitioner's ability to receive a fair sentencing hearing in a way other than those discussed immediately above. Petitioner is entitled to a new sentencing hearing because of the informal evidence even if the federal courts rule that use of such unattributed hearsay in a capital sentencing trial does *not* violate the United States Constitution. This is so because a quirky trap existing in Idaho law at the time of Petitioner's sentencing (but removed to Petitioner's prejudice and surprise in his state appeal) prevented Petitioner from arguing any of the presentence material or other hearsay to rebut the conclusions and arguments of the state based upon that material.

77. At the time of Petitioner's first sentencing, an Idaho statute seemed unambiguously to entitle Petitioner to insist that he be tried only on formal evidence from

witnesses testifying in open court in the sentencing trial of aggravating circumstances.

> "Inquiry into circumstances – Examination of witnesses. – The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section." Idaho Code Section 19-2516.

78. Petitioner relied upon Idaho code Section 19-2516, supra (as well as on the constitutional arguments given above) in his insistence that the sentencing trial be held upon formal evidence only. Even after his arguments were rejected and his objections to hearsay and other information information [sic] were overruled by the sentencing judge, Petitioner was still prevented from arguing that type of evidence by two Idaho cases. If Petitioner wished to preserve his complaint about the lack of formality at his sentencing trial for appeal (and he did, honestly believing the sentencing court was wrong) those two Idaho cases prevented Petitioner from also using this type of evidence as rebuttal and in argument.

79. The two cases, *State v. Coutts*, 101 Idaho 110, 113 (1980); and *State v. Osborn*, 102 Idaho 405 (1981), were the only cases ruling on the effect of Idaho Code Section 19-2516, supra. They held implicitly that Section 19-2516

was valid and effective but not absolute. If a criminal defendant participated in an informal hearing, relying on informal evidence and arguing the same, he waived the protections of the statute and would not be heard to complain of the lack of formality on his appeal.

80. Petitioner was placed between a Scylla and Charybdis of Idaho law: either he introduced and argued informal information (thus losing the opportunity to complain of the informality on appeal) or he refused to participate in the use of informal information, thereby preserving the issue on appeal but severely handicapping his ability to defend himself at the sentencing trial against the information being used by the state and being considered by the sentencing court.

81. Petitioner charted the second course because he honestly believed that existing Idaho law entitled him to a formal hearing under the statute and because he believed (and still believes, as argued above and alleged in his Petition) that the United States Constitution entitles him to be tried only on formal, reliable evidence in the sentencing trial of statutory aggravating circumstances.

82. Petitioner lost his argument in the state supreme court that either the state or federal constitutions or the state statute, Idaho Code Section 19-2516, *supra*, forbids the use of informal information at his capital sentencing trial.[2]

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[2] The Idaho court found an apparent inconsistency between Idaho Code Section 19-2516 and the preceding statute,

(Continued on following page)

83. Apparently settled state law (if not also the United States Constitution) gave Petitioner the right to a formal hearing. When the requested formality was denied, Petitioner was handcuffed in his sentencing hearing by the rule of *Coutts* and *Osborn, supra,* which required Petitioner to avoid referring to or arguing any of the voluminous informal sentencing ecord [sic] if he wished to preserve this issue for appeal. New state law was made in

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(Continued from previous page)

Idaho Code Section 19-2515, which was enacted later, in that Section 19-2515 required the sentencing court to order a presentence report and to hear "all relevant evidence and argument . . . " (Idaho Code Section 19-2515(c)); not just "the testimony of witnesses examined in open court . . . " (Idaho Code Section 19-2516).

Petitioner, relying on well-settled rules of statutory construction that statutes should be read together and interpreted so that no conflict exists whenever possible, had assumed that these two statutes should be interpreted together and that together they mean that:

(1) In all capital cases the judge must order a presentence report;

(2) That report will be used to benefit counsel in preparing for the formal trial of statutory aggravating circumstances and can be used, along with argument of counsel, by the sentencing court in the *weighing* process which occurs only after the trial of statutory aggravating circumstances and only if at least one such statutory aggravating circumstance is found beyond a reasonable doubt; and

(3) The determination of whether one or more statutory aggravating circumstance is present shall only be made upon formal evidence, "the testimony of witnesses examined in open court . . . "

Petitioner's appeal when, to Petitioner's suprise [sic] and prejudice, the Idaho supreme court ruled for the first time that there is no right to a formal capital sentencing trial, even when it is required by a defendant who forgoes a meaningful defense against the informal hearsay material at his sentencing trial in order to preserve the issue as required by the *Coutts* and *Osborn* cases, *supra.*

84. Although Petitioner unambiguously relied on *Coutts* and *Osborn* in both the trial and appellate courts and he explicitly put both the sentencing court and the state supreme court on notice that he felt compelled not to use, discuss or argue informal information, he was not given another sentencing in state courts.

85. Because Petitioner was unfairly handicapped at his sentencing by a then-existing state rule of appellate review, his sentencing trial was neither fair nor consistent with the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The federal courts should order that Petitioner be given a new sentencing trial where he is fairly put on notice of the range and types of information which can be used, so that he also may use and argue that same range of information. This is so even if the federal courts rule that no federal right to demand formal evidence at a capital sentencing trial exists. This, of course, demands a stay of Petitioner's execution.

86. The sentencing court found and weighed two non-existent statutory aggravating circumstances. This claim of Thomas Creech's Petition is neither frivolous nor incredible. It appears on the face of the record (see R. State Supreme Court No. 14480, page 57, Findings C and

D). The district court found two statutory aggravating circumstances in the fact that Petitioner was a life sentence inmate, and that his alleged victim was a fellow inmate. These very circumstances were alleged to elevate his crime to first decree as charged. These two circumstances are not part of the statutory list unless they are found to co-exist with a specific intent to kill, a finding which does not appear in the statutory aggravating circumstance found and listed by the sentencing court. The only way to determine how, or even whether, the sentencing court was influenced by non-existent statutory aggravating circumstances is for Petitioner to be allowed a full hearing on the issue. The state courts glossed over this very serious error, and in so doing failed, Petitioner submits, in their review responsibilities.

87. It may be that the sentencing judge merely committed a clerical error in neglecting to include the words "with a specific intent to kill". On the other hand, it is just as probable that the sentencing judge included two non-existent statutory aggravating circumstances in weighing life and death.

88. The Idaho courts improperly found the statutory aggravating circumstance that Petitioner exhibited the "utter disregard for human life".

89. This statutory aggravating circumstance found in Idaho Code section 19-2515(f) (6) is unconstitutionally vague on its face. It provides "No meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not". *Furman v. Georgia*, 408 U.S. at 313 (White, Justice concurring). Before Petitioner's sentencing, the Idaho Supreme

Court attempted to narrow that aggravating circumstance in *State v. Osborn*, 102 Idaho 405 (1981), with the limitation that it apply to "acts or circumstances surrounding the crime which exhibit the highest, the most callous disregard for human life, i.e., the cold-blooded, pitiless slaver". Petitioner submits that the "utter disregard" circumstance is still too vague to channel the sentencing authority's discretion adequately.

90. Even if the federal courts rule that the *Osborn* case sufficiently narrows the "utter disregard" statutory aggravating circumstance, the Idaho courts committed constitutional error in applying that circumstance to Petitioner.

91. *Osborn* requires a "cold-blooded slayer" for that aggravating circumstance to apply. The court below, however, found that in the present case, the killing evidenced "an excessive violent rage". "Cold-blooded" connotes lack of emotion and is totally inconsistent with excessive rage. The *Osborn* definition of Section (f) (6) (the "utter disregard" circumstance), is also inconsistent with the finding of the sentencing court "[t]hat the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself." Petitioner is entitled to have the federal court review and overturn this finding of a statutory aggravating circumstance. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court upheld a statutory aggravating circumstance as previously limited in Georgia court opinions but overruled the Georgia courts in applying the circumstance in that particular case.

THE SECOND SENTENCING TRIAL

92. Petitioner has raised several serious, substantial complaints about the sentencing trial held January 11, 1982. As is demonstrated below, *not one* of those defects was cured by the subsequent retrial of his sentence conducted March 17, 1983. A stay of execution is absolutely essential for a thorough contemplation of these federal claims. There is not sufficient time left before Petitioner's execution date for the federal courts even to sift through the state record (transcripts, clerk records, briefs and opinions) let alone to allow thorough briefing, argument and hearings.

93. As noted above, Petitioner has been given two sentencing hearings. The first death sentence imposed against Petitioner in this case was ruled to be void because it was imposed in writing, from chambers, in the absence of Petitioner and his counsel. The state supreme court retained jurisdiction of Petitioner's appeal while resentencing occurred. The pertinent portions of the state supreme court's order are quoted below:

> "It appearing from the record, without any contention otherwise by the respondent State of Idaho, that contrary to the requirements of I.C. Section 19-2503 and I.C.R. 43(a), the trial judge purported to impose sentence in the absence of defendant and his counsel and without the presence of defendant and his counsel in open court, but rather by means of a written imposition of a sentence of death;
>
> "NOW, THEREFORE, IT IS HEREBY ORDERED that the sentence of death imposed upon the

> defendant in the absence of the defendant and his counsel be and the same hereby is *vacated* and the cause is remanded to the Honorable Robert Newhouse, District Judge of the Fourth Judicial District of the State of Idaho, Ada County, who shall within fourteen (14) days from the date of this Order, in open court and in the presence of defendant and his counsel, enter a judgment of conviction *and impose such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event* that said Judge shall impose a sentence of death, a warrant therefor shall issue in accordance with I.C. Section 19-2705." (R. Idaho Surpeme [sic] Court #15000, p. 8-9.) (Emphasis added.)

94. The resentencing was conducted on a bare one and one-half days notice to Petitioner and his counsel. Petitioner strenuously objected and pressed for more time. Petitioner asked for a meaningful opportunity to prepare for sentencing. Petitioner pressed for discovery in the form of:

(1) Access to inmate institutional records of both Petitioner and the alleged victim (R. Idaho Supreme Court #15000, p. 18-19);

(2) Disclosure of the whereabouts (if known) of specified inmate witnesses who had since been released (R. Idaho Supreme Court #15000, p. 21-23);

(3) Disclosure of the names and current whereabouts of other inmates residing in the tier where Petitioner and the victim fought (R. Supreme Court #15000, p. 24-26);

(4) Access for Petitioner's counsel and one witness to the tier where the crime allegedly occurred so that the crime scene could be inspected and photographed (R. Idaho Supreme Court #15000, p. 27);

(5) Access to the Petitioner's presentence report (R. Idaho Supreme Court #15000, p. 28); and

(6) Appointment of a designated examiner to conduct a current psychiatric evaluation of Petitioner.

95. This second sentencing "trial", if it can be called that, resulted in the death sentence under which Petitioner is currently suffering. The first sentence was unambiguously "vacated" by the state supreme court. At the second trial of March 17, 1982, the sentencing judge merely read into the record his findings, conclusions and death sentence which resulted from the first sentencing trial held more than one year before. Petitioner was denied any meaningful opportunity to present witnesses in mitigation. The sentencing judge repeated all the mistakes of the first sentencing complained of in the previous section and reiterated all the same erroneous findings in the second sentencing. In addition, the sentencing court compounded all the constitutional defects of the January 11, 1983 hearing by refusing to give Petitioner adequate preparation time or discovery.

96. As a practical matter, the sentencing court refused to consider *any* mitigating evidence from Petitioner in the second sentencing. In doing so that court violated virtually every constitutional doctrine established about the conduct of capital sentencing trials since *Furman v. Georgia*, 408 U.S. 238 (1972). E.g. *Lockett v. Ohio*, (438 U.S. 536 (1978)) and *Eddings v. Oklahoma*, (102 S.Ct.

869 (1982))stand for the proposition that capital defendants *must* be given the opportunity to present mitigating evidence and to have that evidence considered before sentence is passed. Numerous supreme court opinions have likened the capital sentencing trial to a trial of guilt or innocence and extended the protections of the guilt trial to capital sentencings. See, e.g. *Gardner v. Florida*, 430 U.S. 349 (1977) (forbidding use of undisclosed information); *Bullington v. Missouri*, 101 S.Ct. 1852 (1981) (double jeopardy; the capital sentencing is, for constitutional purposes, a trial); and *Presnell v. Georgia*, 439 U.S. at 16 (1978) (the fundamental principles of procedural fairness apply no less at the penalty phase of a capital case than to the guilt phase).

97. It is inconceivable that the Supreme Court would countenance a retrial of any criminal defendant who had won vacation of his conviction due to errors in the first trial if in the retrial the defendant was prevented from producing any evidence at all, except that already introduced at his first trial. Yet that is exactly what happened to Petitioner at the retrial of his capital sentencing issues. He had no time to summon witnesses, no discovery of relevant information and no adequate time for preparation.

98. Respondents may try to counter these claims by contending that the sentencing court considered the record of the first trial, at which Petitioner was given an adequate opportunity to present mitigation. However, in several respects the first sentencing trial was not adequate, as discussed before in this Petition. Furthermore,

Petitioner actually would have produced more and different evidence at the second trial if he had been given the opportunity.

99. By the second trial, Petitioner had been on death row for more than a year since the first sentencing and had undergone several changes which he had a right to offer in mitigation. He could have shown his value as a human being by showing how he wrote a song for a badly injured, hospitalized young girl. His spiritual advisors could have testified about his growth and increased sensitivity. Petitioner could have had guards testify that he was not being a threat or a management problem. All this evidence *could* not have been produced at the first hearing because it concerned the period since his first sentencing.

100. At the March 17th retrial, Petitioner wished to produce evidence about the crime itself which he had not presented at the first sentencing trial. At the second sentencing Petitioner had the benefit of the sentencing court's findings issued a year before. Some of those findings took Petitioner by surprise. He wished to respond to those findings with evidence but did not receive the opportunity to do so.

101. In summary, the capital sentencing trial of March 17, 1983 (which resulted in Petitioner's current death sentence) repeated all the violations of the United States Constitution which occurred a year before and then compounded those errors by denying Petitioner any meaningful opportunity to prepare and to produce a defense at the second sentencing trial.

PRAYER

Wherefore, Petitioner prays this Court:

1. Issue a Writ of Habeas Corpus to have Petitioner brought before it to the end that he may be discharged from his unconstitutional restraint on these charges and/or be relieved of his unconstitutional sentence of death;

2. Order the Respondent to produce the transcripts in clerk's records from all proceedings in state court, including post conviction motions;

3. Require Respondent to file an answer in which Respondent must specifically admit or deny Petitioner's factual allegations.

4. Review the entire state court record, including transcripts, clerks' records, minute entries, briefs and opinions;

5. Order that Petitioner, who is indigent, may proceed without prepayment of costs or fees;

6. Order discovery on behalf of Petitioner pursuant to Rule 6 of the Rules Governing Section 2254 cases;

7. Appoint experts to assist Petitioner in preparation and presentation of his claims;

8. Conduct a hearing at which argument and proof may be offered concerning the allegations of this petition;

9. Stay Petitioner's execution pending final disposition of this petition; and

10. Grant such further relief as may be just and appropriate.

Respectfully submitted,

ROLF M. KEHNE
WIEBE & KEHNE
102 South 17th Street, Suite 200
Boise, Idaho 83702
Telephone (208) 336-6777

Attorneys for Petitioner

By _____
ROLF M. KEHNE

STATE OF IDAHO,)
: ss.
County of Ada.)

THOMAS CREECH, being first duly sworn, upon oath, according to law, deposes and says:

That he has read the foregoing Petition and that he knows the contents thereof to be true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the relief sought therein.

_____
THOMAS CREECH

SUBSCRIBED and SWORN to before me this ___ day of January, 1986.

_____
Notary Public for Idaho
Residing at Boise, Idaho

JIM JONES
Attorney General
Office of Attorney General
State of Idaho
Statehouse, Room 210
Tel.: (208) 334-2400

LYNN E. THOMAS
Solicitor General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, vs. A. J. ARAVE, WARDEN, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, and JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	CIV. NO. 86-1042 ANSWER (Filed Mar. 5, 1986)

The respondent custodial officer answers the Petition for a Writ of Habeas Corpus as follows:

I.

GENERAL RESPONSE TO THE PETITION

1. Petitioner is detained by the State of Idaho pursuant to a judgment of the District Court for the Fourth Judicial District of the State of Idaho filed March 17, 1983, by which the petitioner was sentenced to be put to death pursuant to the law of the State of Idaho, which conviction and sentence were affirmed on appeal to the Supreme Court of the State of Idaho in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

2. Petitioner subsequently moved to withdraw his plea of guilty, which motion was denied by the trial court, and the trial court's order denying the motion to withdraw petitioner's plea was affirmed on appeal by the Supreme Court of the State of Idaho in *State v. Creech*, Idaho S.Ct., No. 15475, June 20, 1985.

3. The District Court of the Fourth Judicial District in and for the State of Idaho set the date of petitioner's execution as February 3, 1986, which action was stayed by order of this court on January 31, 1986.

4. The petition does not state facts pointing to a real possibility of legal error cognizable in the federal courts and should be dismissed summarily.

5. The Petition for a Writ of Habeas Corpus constitutes an abuse of legal process for the following reasons:

a. Petitioner has repeatedly perjured himself, by his own admission, and his factual allegations are wholly unworthy of belief.

b. Petitioner has repeatedly recanted testimony given under oath, including that given at

the time he entered his guilty plea, at which time he stated that his plea was wholly voluntary and that he had intended to kill his victim.

c. Petitioner has attempted to delay his execution by reserving issues to be raised in repetitious litigation, in violation of state law requiring him to raise such issues in state proceedings or forfeit them.

d. Petitioner has repeatedly connived to construct fraudulent justifiable homicide theories, one of which is part of his present claim, being fully aware by virtue of his lengthy experience with the criminal justice system that self-defense, or defense of others, is a defense to a charge of murder.

6. Petitioner has exhausted all available state remedies.

7. Petitioner has procedurally defaulted all legal issues except the constitutional validity of the sentence of death imposed upon him and the wholly state law question of whether he should have been allowed to withdraw his guilty plea by failing to raise such issues in accordance with state law.

8. Because of such procedural defaults, petitioner is not entitled to litigate in a federal habeas corpus proceeding any claim other than the constitutional validity of the sentence imposed upon him.

9. The petition does not state facts pointing to a real possibility of legal error cognizable in the federal courts, and it should be dismissed summarily.

II.

ANSWER TO THE ALLEGATIONS OF THE PETITION

Without waiving petitioner's claim of procedural default, and without conceding that any allegation of the petition states a federally reviewable claim for relief, respondent answers the allegations of the petition as follows:

1. Respondent admits the allegations of paragraphs numbered 1, 5 and 66.

2. Respondent admits the allegations of paragraph 4, except that respondent asserts the allegations of paragraph 4 are factually incomplete.

3. Respondent admits the allegations of paragraph 11 of the petition, except that with respect to paragraph 11(C) respondent denies that the trial court made no findings of fact and conclusions of law with respect to petitioner's motion to withdraw his guilty plea and asserts further that none were required under state law, and the claim raises no federal question.

4. Respondent has no knowledge of the facts asserted in the following numbered paragraphs and therefore denies the same: 22, 23, 43.

5. The following numbered paragraphs are denied: 12, 18, 19, 20, 21, 25, 27, 28, 30, 31, 36, 37, 38, 39, 44, 45, 46, 51, 53, 54, 56, B, B-1, C, 61, 62, D, 63, F, 69, 70, 72, 73, 74, 75, 76, 77, 81, 83, 85, 86, 88, 89, 90, 92, 95, 97, 99, and 101.

6. The following numbered paragraphs are argumentative or assert interpretive versions of events as

though they were "facts," or both, and are denied: 6, 13, 14, 24, 26, and 47.

7. The following numbered paragraphs argumentatively assert factual matters out of context in a misleading manner or are argumentative, or both, and are denied: 16, 17, 24, 32, 48, 49, and 50.

8. The following numbered paragraphs assert or imply incorrect legal arguments and are denied: 33, 34, 35, 52, 55, 57, 58, 59, 60, B, B-2, B-3, 64, 65, 67, 71, 78, 79, 80, 82 and footnote, 84, 87, 91, 94, 96, 98, and 100.

9. The following paragraphs assert incorrect factual arguments and are denied: 40, 41, 42, 65.

10. Paragraph 2 is denied to the extent that it asserts that the State Supreme Court ordered "resentencing" of petitioner.

11. Paragraph 3 is denied to the extent that it asserts that the Board of Corrections has unlimited discretion to choose between a firing squad and intravenous injection as the method of execution.

12. Paragraph 8 is denied to the extent that it asserts that petitioner appealed his conviction.

13. Paragraph 9(A) is denied to the extent that it asserts that the State Supreme Court ordered "resentencing" of the petitioner.

14. Paragraph 15 argumentatively asserts factual matters out of context in a misleading manner and is denied.

15. Paragraph 29 is denied except that respondent admits the excerpted language from the Idaho Penal Code.

16. With respect to paragraph 68, respondent admits that petitioner's sentencing hearing was held January 11, 1982, and that the Idaho Supreme Court, while retaining jurisdiction, ordered the district court to pronounce sentence in the defendant's presence, and denies the remaining argumentative assertions of paragraph 68.

17. With respect to paragraph 93, respondent denies the petitioner has been given two sentencing "hearings" and asserts that the sole purpose of the remand ordered by the supreme court during petitioner's appellate sentence review was to require the trial court to announce sentence in the petitioner's presence and the supreme courts's order had no purpose to create an occasion for a new sentencing hearing. The quotation from the supreme court's order appearing in paragraph 93 is admitted; the argumentative assertions of paragraph 93 are denied.

III.

AVAILABILITY OF TRANSCRIPTS

1. The following transcripts and exhibits are appended hereto:

EXHIBIT A – Vol. I, Idaho Appellate Proceeding #14480.

EXHIBIT B – Vol. II, Idaho Appellate Proceeding #14480.

EXHIBIT C – Vol. I, Idaho Appellate Proceeding #15475.

EXHIBIT D – Vol. II, Idaho Appellate Proceeding #15475.

EXHIBIT E – Creech excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT F – Helby excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT G – Hurst excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT H – Heyrend excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT I – Estes excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT J – Estes excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT K – Treleaven excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT L – Humiston excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT M – Appellent's Brief, Idaho Appellate Proceeding #14480.

EXHIBIT N – Respondent's Brief, Idaho Appellate Proceeding #14480.

EXHIBIT O – Appellant's Brief, Idaho Appellate Proceeding #15114.

EXHIBIT P – Respondent's Brief, Idaho Appellate Proceeding #15114.

EXHIBIT Q – Slip Opinion, *State v. Creech*, #15475.

EXHIBIT R – Appellant's Brief, Idaho Appellate Proceeding #15475.

EXHIBIT S – Respondent's Brief, Idaho Appellate Proceeding #15475.

EXHIBIT T – Brief in Support of Rehearing, #15475.

2. The following additional transcripts and documentary exhibits are not yet available, but respondent estimates that these materials will be available within two weeks time:

a. Additional factual materials to be used to support a motion for summary judgment.

b. Remand hearing, Idaho appellate proceeding 14480.

3. Certified copies of the following are attached hereto:

a. Judgment of conviction filed January 25, 1982.

b. Death Warrant filed January 25, 1982.

c. Report on Imposition of Death Penalty filed January 25, 1982.

d. Findings filed January 25, 1982.

e. Judgment of Conviction filed March 17, 1983.

f. Death Warrant, March 24, 1983.

g. Death Warrant, September 23, 1983.

h. Order for Execution, April 3, 1984.

i. Death Warrant, January 10, 1986.

Respondent prays that the writ be denied, or, if granted, that all relief be denied.

DATED this 5 day of March, 1986.

/s/ Lynn E. Thomas
LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5 day of March, 1986, I served a true and correct copy of the foregoing ANSWER by placing a copy thereof in the United States mail, postage prepaid, addressed to Rolf M. Kehne, Esq., 102 South 17th Street, Suite 200, Boise, Idaho 83702.

/s/ Lynn E. Thomas
Lynn E. Thomas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, v. A. J. ARAVE, Warden, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, and JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	)	CASE NO. 86-1042 MEMORANDUM OPINION AND ORDER (Filed Jan. 31, 1986)

I. INTRODUCTION

On January 29, 1986, Petitioner Thomas E. Creech submitted an application for stay of execution of his sentence of death, and supporting memorandum in conjunction with a petition for writ of habeas corpus. Creech is scheduled to be executed on February 3, 1986.

The following review of the prior state court proceedings is taken from the petition. On January 25, 1982, a judgment of conviction was entered against Creech by the Idaho Fourth Judicial District Court sentencing Creech to death for the first degree murder of David Jensen. At the time of the murder Creech was serving a

life sentence of imprisonment in the Idaho State Correctional Institution. Creech had originally pled not guilty to the charge, but changed his plea to guilty on August 28, 1981. There was no trial on the issue of guilt and the trial of aggravating and mitigating circumstances (for sentencing) was held before the court sitting without a jury.

Creech appealed his conviction and death sentence. On February 24, 1983, the Idaho Supreme Court, retaining jurisdiction of Creech's appeal, vacated his death sentence and ordered resentencing. The trial court resentenced Creech to death on March 17, 1983. On May 23, 1983, the Idaho Supreme Court affirmed the judgment and sentence in a three-two decision. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). The Idaho Supreme Court denied Creech's petition for rehearing. The United States Supreme Court subsequently denied Creech's petition for writ of certiorari. *Creech v. Idaho*, ___ U.S. ___, 79 L.Ed.2d 722, 104 S.Ct. 1327 (1984).

Creech also moved to arrest judgment and to withdraw his guilty plea on May 19, 1983. On June 24, 1983, this motion to withdraw was denied as was a request for a hearing on his motion to withdraw the guilty plea. Creech appealed the denial. This appeal was subsequently dismissed by the Idaho Supreme Court.

Creech subsequently renewed his motion to withdraw. The motion to withdraw was again denied on March 6, 1984. Creech again appealed the denial of his motion to withdraw the guilty plea. The Idaho Supreme Court affirmed the denial on December 31, 1985. The State district court issued a death warrant on January 10, 1986, ordering Creech's execution for February 3, 1986.

II. DISCUSSION

A. Preliminary Review of the Petition

Creech brings this petition pursuant to 28 U.S.C. § 2254, challenging his conviction and imposition of the death penalty. This court has jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254.

Rule 4 of the Rules Governing Section 2254 Habeas Corpus Cases provides that the petition shall be promptly examined by the district judge, and if it plainly appears from the face of the petition that the petitioner is not entitled to relief in the district court, the petition shall be summarily dismissed.

Creech asserts six basic grounds for relief. These assertions can be briefly summarized as follows:

1. Creech unknowingly waived two potential defenses at the time he entered his guilty plea and, hence, the plea was not understandingly made. Creech asserts (a) he mistakenly believed any killing by a prisoner serving a life sentence was first degree murder, and (b) that a psychological evaluation had just begun at the time he entered his plea and the results of that evaluation support a defense of insanity.

2. The lack of adequate time for counsel to prepare for court hearings (due to inadequate notice of those hearings and counsel's work load with the Ada County Public Defender's Office) denied Creech effective assistance of counsel.

3. The post-conviction proceedings at both the trial and appellate levels were fundamentally unfair. Creech asserts (a) the trial court's setting of a two-week time period after remittitur as the deadline for filing all post-conviction challenges, subject to waiver if not timely filed, and (2) the absence of any findings of fact by either the trial court or the Idaho Supreme Court, constituted fundamentally unfair post-conviction proceedings.

4. The issues raised by Creech's specific challenges to the Idaho death penalty statutory scheme are currently under consideration by the Ninth Circuit. *See Adamson v. Ricketts*, 758 F.2d 441, *withdrawn, reh'g granted* (en banc), 764 F.2d 1343 (9th Cir. 1985). Creech challenges those provisions of the Idaho Code which require the finding of aggravating and mitigating circumstances to be made by the court sitting without a jury.

5. The state court's failure to consider the proffered mitigating circumstance of Creech's mental incapacities at the time of the killing.

6. The sentencing hearings were conducted in an unlawful manner. Creech asserts the first sentencing hearing was conducted unlawfully in that the trial court considered, in finding aggravating and mitigating circumstances, such materials as the presentence report, physicians' reports, and newspaper articles without giving Creech the opportunity to cross-examine or rebut these materials, and thus ignoring well-established reliability requirements for capital cases. Creech also asserts the trial court violated an Idaho statute requiring consideration of only live testimony given at the sentencing hearing. Further, Creech asserts the trial court found

and weighed two aggravating circumstances which were simply nonexistent. Finally, Creech contends he should have been allowed time to investigate, prepare for, and present information at the second sentencing hearing (at which time the court simply read its previous findings).

It is not clear from the petition whether Creech has presented all of these issues to the Idaho Supreme Court. Consequently, the court is unable to find at this time that Creech has exhausted all available state remedies. However, it does not appear from the petition that Creech has not exhausted all state remedies. Further, the allegations supporting each of the six primary bases for relief, on their face, are not insubstantial. Therefore, the court is unable to determine from the face of the petition that it plainly appears the petitioner is not entitled to relief in this court. Summary dismissal is not appropriate.

The application to proceed in forma pauperis is in the proper form and establishes the petitioner's indigency. Therefore, the petition shall be filed and served.

B. Application for Stay of Execution of the Sentence of Death

Title 28, U.S.C. § 2251 provides that a judge of the United States before whom a habeas corpus proceeding is pending may stay any proceeding in state court against the petitioner for any matter involved in the habeas corpus proceeding. There is no question that the State's execution of Creech is a matter involved with this habeas corpus proceeding. Therefore, Section 2251 provides this court with the jurisdiction to entertain the application for

stay of execution and the power to grant that stay, if warranted.

While there is no well-developed body of case law to guide the decision to grant or deny a stay of imminent execution of a death sentence, Fourth Circuit Judge Phillips has identified what I believe are the essential factors which must be considered in determining whether or not to grant the stay. Relying upon the opinion of Mr. Justice Rehnquist set out in *Evans v. Bennett*, 440 U.S. 1301 (1979), Circuit Judge Phillips stated:

> In the final analysis, there is required a practical judgment whether in the particular situation "the legal issues have been sufficiently litigated and relitigated that the law must be allowed to run its course"; and whether the criminal defendant's entitlement to "all the protections . . . which surround him under our system prior to conviction and during trial *and appellate review*" [emphasis mine] have been accorded.

Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980) (emphasis in original).

Clearly, that point has not been reached in this case. This is Creech's first petition for writ of habeas corpus in the federal courts, and with the exception of his petition for writ of certiorari to the United States Supreme Court (which was denied), this is his first attempt to litigate those issues asserted in the petition in federal court. Creech is in no way attempting to relitigate an issue already decided by the same tribunal before which it is pending.

As to the second factor, Creech is entitled to pursue federal habeas corpus review of alleged constitutional

deficiencies in the state court proceedings. Although there are "sharply differing views over whether our law *ought to provide* that one convicted of crime in state court may obtain a second 'collateral' review in federal courts of constitutional issues arising from his conviction. . . . the law of our country *does provide for it* and federal court judges take an oath to carry out that law." *Goode v. Wainwright*, 670 F.2d 941 (11th Cir. 1982) (emphasis in original).

Finally, as noted earlier, Creech's petition presents nonfrivolous issues which must be examined to determine whether his trial and appeal afforded him the rights guaranteed by the Constitution. It is simply impossible for the court to responsibly address the issues raised in the petition prior to the scheduled time for execution of the death sentence. Consequently, the application for stay of execution of Creech's death sentence should be granted. *See Barefoot v. Estelle*, 463 U.S. 880 (1983); *Dobbert v. Strickland*, 670 F.2d 938 (11th Cir. 1982); *Shaw v. Martin*, 613 F.2d 487 (4th Cir. 1980).

The court has considered the potential for deliberate dilatoriness in submitting the petition and seeking a stay at this late date so that the court might feel the inevitable pressure "which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them." *Evans v. Bennett*, 440 U.S. at 1307. Since the death warrant was issued on January 10, 1986, Creech unsuccessfully sought a stay from both the state trial court and the Idaho

Supreme Court. The court is satisfied that the record demonstrates counsel for Creech has made expeditious efforts to receive a stay, culminating in presentation of the petition to this court.

III. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the application to proceed in forma pauperis should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus shall be filed and served on the named respondents. The respondents shall file an answer to the petition within twenty (20) days of the date the petition is served on them.

IT IS FURTHER ORDERED that the application for stay of execution of death sentence is granted. An order will issue accordingly.

DATED this 31 day of January, 1986.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, v. A. J. ARAVE, Warden, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	)	CIVIL NO. 86-1042 MEMORANDUM OPINION AND ORDER (Filed Jun. 18, 1986)

I. INTRODUCTION

This is a habeas corpus action brought pursuant to 28 U.S.C. § 2254 (1984). The petitioner, Thomas E. Creech, is currently incarcerated at the Idaho State Correctional Institution (ISCI) pursuant to a state court Judgment. Creech is under penalty of death for the murder of David Jensen. Jensen was killed by Creech on May 18, 1981. At that time, both Creech and Jensen were inmates at ISCI and were being housed in the maximum security unit of the prison, and Creech was serving two life sentences for previous convictions of first degree murder. Creech pled guilty to the first degree murder of Jensen on August 28, 1981.

Creech submitted his petition for writ of habeas corpus on January 29, 1986. The petition was accompanied by an application to proceed in forma pauperis and an application for stay of execution of his sentence of death. On January 31, 1986, the court granted the application to proceed in forma pauperis, ordered the petition filed and served, and stayed the execution of the death sentence. Creech attacks the validity of his guilty plea and sentence of death. Creech asserts six basic grounds for relief under the due process clauses of the fifth and fourteenth amendments, the sixth amendment's right to counsel, and the eighth amendment's proscription of cruel and unusual punishment. These assertions are briefly summarized as follows:

1. *Involuntary plea* – Creech contends his plea was involuntary because of (a) the medication he was receiving at the time he pled guilty, (b) suicidal depression, (c) his failure to fully understand the elements of the offense with which he was charged, (d) threats to his family, and (e) inadequate time to consult with his attorney.

2. *Conditional plea* – Creech contends his plea was conditional upon completion of a psychological evaluation if such evaluation showed he was incompetent to plead guilty at the time the plea was entered or that an insanity defense existed.

3. *Denial of effective assistance of counsel* – Creech contends he was denied effective assistance of counsel at the time of the plea because (1) counsel's motion for a continuance of the plea hearing was denied, and (2) during the post-conviction relief proceedings counsel was

denied adequate time in which to prepare for those proceedings.

4. *Inadequate sentencing proceedings* – Creech contends the sentencing proceedings were inadequate because the state court found nonexistent aggravating circumstances and the court denied Creech the opportunity for discovery or the presentation of evidence at the second sentencing hearing (which took place after the Idaho Supreme Court had vacated the death sentence imposed at the first sentencing hearing).

5. *Inadequacy of post-conviction relief proceedings* – Creech contends the post-conviction relief proceedings in the state court were inadequate because the state court failed to make written findings.

6. *Sentencing statutes unconstitutional* – Creech contends the Idaho death sentencing statutory scheme is unconstitutional.

II. STATE COURT PROCEEDINGS

On May 18, 1981, a Complaint was filed charging Creech with the first degree murder of David Jensen. Probable cause was established at a preliminary hearing held May 29, 1981. Creech was arraigned on June 19, 1981, before the State District Court. Creech was represented by a public defender at both the preliminary hearing and the arraignment. A copy of the information was given to Creech at the arraignment and he waived formal reading of the information. A plea of not guilty was entered and trial was set for November 2, 1981.

On August 28, 1981, a hearing was held at which Creech changed his plea of not guilty and entered a plea of guilty to the charge of first degree murder. This hearing was prompted by a letter from Creech to Judge Newhouse, the state trial judge presiding over the case. This letter from Creech was dated August 26, 1981. Judge Newhouse accepted the plea of guilty, ordered a presentence investigation report, and set the matter down for further proceedings.

The judgment of conviction and sentence of death were entered January 25, 1982. The death sentence was vacated by the Idaho Supreme Court. Creech was resentenced to death on March 17, 1983. This sentence of death was affirmed on appeal by the Idaho Supreme Court. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). Creech subsequently moved to withdraw his guilty plea. The motion was denied by the state trial court. The trial court's denial of the motion to withdraw the guilty plea was affirmed on appeal by the Idaho Supreme Court. *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985).

III. ANALYSIS

A. Need for an evidentiary hearing

On March 18, 1986, the court met in chambers with counsel to discuss a briefing schedule and the need for an evidentiary hearing. This meeting was unreported. On March 19, 1986, the court entered an order establishing a briefing schedule and setting a date for hearing in the matter. The order reflects that briefing was to be completed by April 18, 1986, and that a hearing was set for either May 9 or May 23, 1986, depending on the court's

calendar. The time lag between final briefing and a hearing date was necessary to allow the court to review counsel's positions and determine the need for and scope of an evidentiary hearing. The court's May 8, 1986, order established a new briefing schedule, continued the May 23rd hearing date until May 29, 1986, and documented counsel's inability to meet the earlier established deadlines.

Primarily due to petitioner's counsel's inability to comply with the briefing schedule (ten days of the delay is attributable to the respondent and twenty-one days is attributable to the petitioner), the court was left with only ten days between the completion of briefing and the time set for hearing rather than the twenty-one days allowed for in the original scheduling order. Briefing was completed on May 19, 1986, and the court informed counsel on May 22, 1986, of the nature and scope of the hearing. The court ordered an evidentiary hearing limited to the introduction of testimony and exhibits relevant to the medication, or lack thereof, being used by Creech at the time he pled guilty and the effect of the use of such medication. The court concluded that all other factual issues raised by the petition and briefing were adequately presented and documented in the State proceedings.

At the May 29th hearing, counsel for the petitioner was not prepared to proceed with the evidentiary portion of the hearing on the grounds that the court had failed to appoint an expert as requested and had failed to specifically grant discovery. In addition, counsel indicated generally that he had simply not had enough time to prepare for the evidentiary hearing.

After admonishing petitioner's counsel that his unexcused dilatoriness was the primary cause of his perceived difficulties, the court indicated it would not be possible to continue the matter. Argument was given on the legal issues raised by the petition and briefing.

1. Basis for denying petitioner's motion for continuance.

The petitioner has at no time during these proceedings moved for the appointment of an expert to assist him in this matter. Similarly, the petitioner has failed to identify specific factual issues for which discovery was required. The only formal request for the assistance of an expert and discovery is found on page 42 of the petition under the "PRAYER." There, the petitioner asked the court to "appoint experts to assist Petitioner in preparation and presentation of his claims" and "order discovery on behalf of petitioner pursuant to Rule 6 of the Rules Governing Section 2254 Cases."

Although the matter of discovery and an evidentiary hearing was discussed with counsel in chambers on March 18, 1986, counsel for the petitioner indicated only his general need for discovery on a variety of issues all of which at that time appeared to have been adequately covered in the state court proceedings. The court so indicated to counsel.

In sum, the petitioner failed to advise the court of the need for discovery and expert assistance on specific factual issues in a fashion that would allow the court to determine whether such discovery and assistance was necessary. Nor did the petitioner advise the court that

notification of the parties on May 22, 1986, as to the nature and scope of the May 29th hearing would not provide counsel with adequate time to prepare for that hearing. Finally, as noted earlier, the petitioner's own delinquency in this matter culminated in the drastically reduced period of time between the end of briefing, at which time the court could determine the nature and scope of the hearing necessary and the date set for hearing – that being the period of time for counsel's final preparation for the hearing. Hence, the petitioner's motion to continue the May 29, 1986, hearing was denied.

B. Procedural Default

The respondent argues that all federal claims brought by Creech are barred by the doctrine of procedural default. The respondent cites the United States Supreme Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Engle v. Isaac*, 456 U.S. 107 (1982), in support of this proposition. Those cases, however, are inapposite. Both *Wainwright* and *Engle* involve a petitioner's failure to comply with the State's contemporary objection rule and the state appellate courts refused to hear the petitioner's claims for failure to so comply. The Supreme Court in those cases simply held that because the petitioner had procedurally defaulted on those claims in the state courts, they could not then be raised in federal habeas proceedings.

In this case, the respondent has identified no procedural default which has occurred in the state courts. Rather, the respondent suggests Creech is barred from raising his federal claims in this court because he has not

previously raised those claims in state court. The respondent chooses to characterize this as a procedural default rather than a failure to exhaust state remedies because of the state trial court's order that all claims for post-conviction relief be filed on or before February 6, 1984. Any claims not made by that time were deemed waived.

Clearly, the Idaho Supreme Court has not defaulted any of Creech's claims for failure to comply with the trial court's order. The only reference made to the trial court's order is in the last paragraph of its opinion in *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985). The court stated:

> Defendant also challenges that portion of the January 24 order which deemed all issues not raised in the proceedings waived. However, during the proceedings defendant did not seek to raise any issues other than withdrawal of his guilty plea. On appeal, defendant has failed to show that he has been prejudiced in any way by the waiver portion of the order. Therefore, the issue is not properly before us.

Id. at 597. It is clear from this language that the Idaho Supreme Court simply refused to address the question of the propriety of the trial court's order.

Respondent's position is effectively one asserting Creech has failed to exhaust available state remedies on the federal claims now raised in this habeas proceeding. The respondent suggests that because the only issue presented to the Idaho Supreme Court in *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985), was the propriety of the trial court's denial of Creech's motion to withdraw his guilty plea, that motion being brought pursuant to Rule

33 of the Idaho Rules of Criminal Procedure, the Idaho Supreme Court did not pass on the constitutional issues now being raised. This argument is without merit.

A review of the appellate briefs submitted to the Idaho Supreme Court in *State v. Creech, id.*, as well as the Idaho Supreme Court's decision in that case (particularly the dissenting opinion of Justice Bistline) demonstrates that the constitutional issues now raised by Creech were raised and considered by the Idaho Supreme Court. It is of no consequence that the Idaho Supreme Court evaluated the constitutional claims under the "manifest injustice" standard specified by Rule 33.

The court finds that Creech has not procedurally defaulted on any claims raised in his habeas proceeding nor has he failed to exhaust state remedies available to redress those claims.

C. Failure to Grant Defense Counsel's Motion for Continuance of the Plea Hearing

In a handwritten letter to Judge Newhouse, dated August 26, 1981, Creech stated he wished to change his plea of not guilty to a plea of guilty and requested a hearing as soon as possible.[1] The record does not disclose

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[1] The text of Creech's letter is set out below:

"Dear Sir,

"I'm writing to you in regards to changing my plea. I would like to have a hearing so I may change my plea from not guilty to guilty. My attorneys have

(Continued on following page)

when Judge Newhouse received the letter. Judge Newhouse, upon his own motion, set the matter for hearing and the hearing was held on August 28, 1981, at 11:10 a.m. The record also does not disclose how this hearing was noticed or how and when counsel for the defense and the prosecution were notified of the impending hearing. The attorney for Creech representing him at the time he entered his guilty plea (and who continues to represent Creech in this proceeding) states by way of affidavit filed in this action that:

> "On that day I was ushered into Court by Judge Newhouse. I had just barely finished a very high publicity trial of an attempted murder charge, State v. Elmer Manchester. In fact, Mr. Manchester's verdict of acquital [sic] came in the same morning that Tom Creech was allowed to plead guilty. I had absolutely no advance notice that a guilty plea was going to be entertained on that

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(Continued from previous page)

advised me against doing this, but at the same time tell me I'm going to be convicted regardless of whether I go to trial or not.

"It is my wish that I be alowed [sic] to change my plea, and enter a new plea of guilty to the charges against me. I have given this a great deal of thought and I am aware of what my punishment can be. But, I am ready to accept the responsibility of taking another life (which I did) and I am ready to accept and face my punishment.

"Therefore I would appreciate an immediate hearing or as soon as you can possibly set a date. Thank you for your time in this matter!

"Respectfully yours, Thomas E. Creech"

> day. I was allowed some short time (less than fifteen minutes, if I recall correctly) to counsel Petitioner to try to talk him out of pleading guilty, or at least talking him into a continuance."

Affidavit of Rolf M. Kehne, filed May 29, 1986, at 11.

The following discussion took place at the beginning of the plea hearing.

> MR. KEHNE: As the Court is aware from the record, Mr. Creech is here upon his desire to withdraw his not guilty plea and tender to the Court a guilty plea.
>
> I want it clear that that is against my advice and it is without my consent. Mr. Creech is refusing to obey my advice, my legal advice to him.
>
> I am not real clear what my responsibilities, my professional responsibilities are in this situation.
>
> I would prefer that we continue this matter for a matter of five days or so so that I could research the issue and consult with lawyers who have handled more death cases than myself before the Court hears the plea.
>
> MR. HARRIS: Your Honor, I think the question of continuance should be left to the defendant. There has never been a representation made to the Court or to me that Mr. Creech is not fully competent to make his own decisions within the realm of the law.
>
> I would oppose a continuance unless in fact the defendant in this case represents that he

> feels it is in his best interest to continue this case.
>
> I am not certain, as evidently Mr. Kehne is not either, what his ethical responsibilities are with regard to continuing representing this defendant. However, I am sure legally if Mr. Creech desires to plead guilty, to change his plea at this time, there is no legal foundation for Mr. Kehne as his legal representative to object to that attempt.
>
> So I would only ask that the Court inquire of Mr. Creech at this time with regard to his intent and his desire with regard to the continuation of any defense. I would certainly not oppose the continuance if in fact the defendant thinks it is in his best interest to do so.
>
> THE COURT: We will take you first, Mr. Kehne, and then I do want to talk to Mr. Creech.
>
> MR. KEHNE: I have nothing further.
>
> THE COURT: Mr. Creech, the only matter I am really taking up to keep up with my agreement with the press at this time are probably two questions. And the first is, what's your reaction to giving your counsel a five-day continuance? I guess I want to hear that first. No, first I want to add, do you want to go forward in accordance with your letter to the Court?
>
> MR. CREECH: Yes, sir.
>
> THE COURT: Okay. What's your reaction to the statements of your counsel in requesting a continuance?
>
> MR. CREECH: I would still like to go ahead today.

THE COURT: You understand exactly what you are doing?

MR. CREECH: Yes, sir.

THE COURT: And you would like to go ahead today, no matter what your counsel says.

MR. CREECH: Yes, sir.

Respondent's Answer, Exhibit A (Transcript of Plea Hearing), filed March 5, 1986, at 39-42. Creech now argues the state trial court's failure to grant counsel's motion for continuance, under the circumstances, denied Creech his rights to due process and effective assistance of counsel.

The court notes at the outset that resolution of this issue is made difficult because of the gravity of the consequences to both parties and the fact that neither counsel's briefing nor the court's research has disclosed case law addressing similar issues under similar circumstances. However, some guidance is found in the Supreme Court's decision in *Morris v. Slappy*, 461 U.S. 1 (1983). In *Morris*, the Court addressed the defendant's motion for a continuance in the context of trial. The court stated:

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel . . . . Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. *Ungar v. Sarafite*, 376 US 575, 589, 11 L Ed 2d 921, 84 S Ct 841 (1964).

Id at 11-12 (citation omitted). The Court in *Ungar v. Sarafite* elaborated somewhat on the standard:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar v. Sarafite, 376 US at 589 (1964).

It is important to the analysis of this issue to discuss the status of Creech's case at the time he decided to change his plea of not guilty to one of guilty. At the time of his arraignment in district court on June 19, 1981, Creech pled not guilty. Trial in the matter was set to commence November 2, 1981. During July of 1981, the State moved to compel the defendant to comply with a discovery motion. The defendant was ordered to comply with the prosecution's request for discovery on or before July 14, 1981. The record does not disclose what information was sought in the prosecution's discovery request. Depositions were taken by the State of two inmates housed in the maximum security unit on the day Jensen was killed. Those depositions were taken on August 4, 1981, and August 10, 1981, with defense counsel present and cross-examining. The court has reviewed the transcripts of those depositions and neither inmate was a witness to the killing and, therefore, could not testify as to the events taking place. Apparently, only Creech knows what actually happened.

On August 11, 1981, the prosecuting attorney advised Creech's counsel that discovery would be furnished by

September 15, 1981. Creech's counsel states in his affidavit that at no time prior to the time Creech pled guilty did he or any other lawyer from the public defender's office spend significant time with Creech. At no time were the elements of the crime or possible defenses discussed. Counsel states further that it was not until sometime after the plea was entered that he discovered Creech may have been guilty of only manslaughter in the killing of Jensen.

In light of the state of the proceedings at the time Creech pled guilty (trial was still over two months away) and counsel's representations, the court finds, as a matter of fact, that counsel had not discussed with Creech the specific elements of the offense with which he was charged or possible defenses to those charges.[2]

Under these circumstances, absent the court's asking Creech if he wanted to continue the matter as requested by his attorney, there is little doubt that the judge's failure to grant the continuance constituted an unreasoning and arbitrary insistance upon expeditiousness in the

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[2] To the extent the petition can be read to include counsel's deficient performance as a basis for the claim of ineffective assistance of counsel, that basis must be rejected. The court has reviewed counsel's performance throughout the proceedings before the state courts and finds counsel's representation did not fall below an objective standard of reasonableness. *See Strickland v. Washington*, ___ U.S. ___, 80 L.Ed.2d 674, 693 (1984).

face of a justifiable request for delay.[3] However, the court did ask Creech if he wished to continue the matter.

It is true, as argued by the respondent, that every defendant has a right to represent himself. *Faretta v. State of California*, 422 U.S. 806 (1975). However, this case does not present a question of whether or not Creech exercised his right of self-representation. By pleading guilty, Creech simply elected not to follow the advice of his attorney. The question squarely presented by this case is whether or not, under the circumstances existing at the time, the state trial judge violated Creech's rights to due process and effective assistance of counsel by allowing Creech only ten or fifteen minutes to discuss the matter with his attorney. In light of the fact that the trial judge asked Creech if he wished to continue the matter so that he might consult further with his attorney and that request having been denied by Creech, the issue might be more

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[3] The record does not disclose why the state trial Judge elected to set the hearing for change of plea only two days after the letter from Creech was written and probably only one day after it was received by the judge. Given the gravity of the consequences which were virtually assured to flow from Creech's plea of guilty, there seems to be little or no reason for setting the hearing at such a time as to effectively deprive Creech's attorney of the opportunity to counsel his client. Although it is not clear whether the state trial judge acted in an extraordinary manner in proceeding as quickly as he did, as suggested by petitioner's counsel, the only effect of setting the matter at a later date would be to give Creech the opportunity to change his mind. It certainly is no affront to justice as administered in this country if a defendant elects not to plead guilty after being advised by counsel, particularly in a case where a plea of guilty will invariably result in imposition of the death sentence.

accurately framed: Did the state trial judge's failure to *allow Creech's attorney* only ten or fifteen minutes *to discuss the matter with his client* constitute a denial of due process and effective assistance of counsel?

A defendant may not be forced to abide by the advice of counsel. It is clear from the record of the plea hearing that Creech's attorney, Rolf Kehne, vigorously counseled his client not to go ahead with the plea at that time. Despite such counsel, Creech elected to go ahead with his plea of guilty on that day stating that he understood exactly what he was doing. There is nothing in the record that in any way suggests Creech did not fully understand exactly what he was doing on August 28, 1981. In fact, it was not until more than a year after he was first sentenced to death that Creech moved to withdraw his guilty plea. Creech had over four months after entry of his plea, but before sentencing, in which to consult with counsel and move to withdraw his guilty plea if he felt the plea had not been validly entered. Creech failed to do so.

Further, the only reason advanced by Kehne for the continuance was his confusion regarding his ethical responsibilities now that Creech had refused to heed counsel's advice. Kehne did not raise any of the factors now asserted as grounds for Creech's constitutional claim.

The court is unable to conclude under the circumstances existing at the time of the plea hearing that the state trial court's denial of counsel's motion for a continuance is unreasoning or arbitrary. Therefore, Creech's constitutional claim in this regard must be rejected.

D. Involuntary Plea

Creech contends his plea was not voluntarily entered because of (a) the medication he was taking at the time he pled guilty, (b) suicidal depression at the time he entered his plea, (c) his failure to fully understand the specific elements of the offense with which he was charged, (d) threats against his family which induced him to plead guilty, and (e) an inadequate amount of time in which to consult with his attorney.

1. Medication.

There is no evidence in the record indicating what medication Creech was on at the time he pled guilty or the potential or real effects of that medication.[4] The only evidence in the record is Creech's testimony at the hearing on his motion to withdraw guilty plea held before the state trial court. Creech testified that the psychotropic medication prescribed for him was changed periodically due to a tolerance buildup. Further, Creech testified that the medication typically took seven to ten days to take effect. It is not clear from this testimony if the medication required seven to ten days to take effect initially or with each change. In any event, there is nothing in this testimony to suggest the medication Creech was using or changes in medication had an adverse impact on his competence to plead guilty.

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[4] See the court's discussion of the need for an evidentiary hearing, *supra*, at pages 5-8.

2. Suicidal depression.

There is nothing in the record to suggest Creech was suicidally depressed at the time he entered his plea of guilty. Creech's statement in his letter to Judge Newhouse that "I am ready to accept the responsibility of taking another life . . . and I am ready to accept and face my punishment" may suggest Creech had accepted the virtually inevitable consequence of his plea of guilty, but it does not suggest he had become so despondent that he was unable to truly appreciate the consequences of his plea of guilty or resist making such a plea. Further, there is nothing in the testimony of the expert witnesses called on behalf of both the prosecution and the defense at subsequent sentencing hearings and post-conviction relief hearings (Doctors Heyrend and Stoner) which suggests Creech was suicidally depressed or otherwise incompetent to plead guilty at the time he entered his plea.

3. Failure to understand the elements of the offense

Creech contends his guilty plea was involuntary because he did not understand at the time he pled guilty that malice was an element of the specific type of first degree murder with which he was charged. Creech asserts he thought any killing of one inmate by another inmate constituted first degree murder.

A plea of guilty may be involuntary where the defendant has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of

guilt. *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). The defendant must receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

In *Henderson*, the Court held a guilty plea was not voluntarily entered to the lesser included offense of second degree murder where that charge was not made in the indictment and the defendant had no notice of the specific intent element of second degree murder. Justice White's concurring opinion in *Henderson* makes it clear that a contrary decision must be reached in this case.

> The problem in this case is that the defendant's guilt has been established neither by a finding of guilt beyond a reasonable doubt after trial nor by the defendant's own admission that he is in fact guilty. The defendant did not expressly admit that he intended the victim's death (such intent being an element of the crime for which he stands convicted); and his plea of guilty cannot be construed as an implied admission that he intended her death because the District Court has found that he was not told and did not know that intent to kill was an element of the offense with which he was charged.[2]

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[2] . . . .

> In those cases in which the indictment is read to the defendant by the court at arraignment or at the time of his plea, his plea of guilty may well be deemed a factual admission that he did what he is charged with doing so that a judgment of conviction may validly be entered against him.

Henderson v. Morgan, 426 U.S. at 649.

In this case, Creech pled guilty to first degree murder as charged in the Information. Creech was furnished a copy of the Complaint at the preliminary hearing and waived a reading of the Complaint (which stated the charge in language identical to that found in the subsequent Information). In response to the judge's inquiry as to what the charge of first degree murder meant to Creech, he responded, "He has got to think about doing it." Whether this reflects Creech's understanding that malice was an element of the offense or that premeditation was required for first degree murder, the statement reflects knowledge that some intent is required for the charge of murder, be it first or second degree. Further, in response to questions from the prosecutor, Creech specifically admitted that he intended to kill Jensen and had kicked him in his throat and his head after Jensen was no longer a threat.

The court finds that Creech understood that malice or intent was an element of first degree murder at the time he pled guilty. Further, the record demonstrates an ample factual basis establishing the required elements of the offense, and therefore, a sufficient factual basis for the state trial court to accept the plea of guilty.

4. Threats to Creech's family.

The only evidence in the record supporting Creech's position that he pled guilty, at least in part, from threats to his family is Creech's own testimony at the hearing on his motion to withdraw his guilty plea. Creech testified that he had received mail from an inmate stating that if Creech got anyone else involved, "that there would be

problems." Creech testified that he understood this to be a threat against him personally. In addition, Creech testified that he and his mother had discussed threatening phone calls that she had received.

The court finds that this self-serving testimony by Creech is insufficient to rebut his statement at the time he pled guilty that he was doing so freely and voluntarily.

E. Conditional Plea of Guilty

Creech now argues, in effect, that his plea of guilty was entered upon the condition that ongoing psychological evaluations would not support an insanity defense. The court is not persuaded by Creech's argument in this regard. First, it is clear from the transcript of the plea hearing that Creech's plea was not conditioned upon the existence of an insanity defense, but rather upon the results of the psychological evaluation showing Creech was not competent to plead guilty. Dr. Stoner was conducting an ongoing psychological evaluation of Creech in August of 1981. Although Dr. Stoner concluded that Creech could not appreciate the wrongfulness of his conduct at the time he killed Jensen, Stoner did not opine that Creech was not competent to plead guilty, understand the nature of the offense or assist in his defense. Further, Dr. Heyrend, called by the prosecution at sentencing, specifically opined that Creech had the capacity to understand the proceedings against him and assist in his defense. Consequently, the court finds that the condition upon which withdrawal of the plea would be allowed by the state trial court was not met.

Second, a valid guilty plea constitutes an admission of facts necessary for conviction and, therefore, removes the issue of factual guilt from the case. Consequently, Creech cannot now assert the defense of insanity, a defense which attacks the factual guilt of the defendant. *See Menna v. State of New York*, 423 U.S. 61, 62 n.2 (1975); *United States v. Burke*, 694 F.2d 632 (9th Cir. 1982).[5]

F. Inadequacy of the Sentencing Proceedings

Creech argues the state sentencing proceedings were constitutionally inadequate for two reasons: (1) the sentencing judge's consideration of all information in the presentence report violated Creech's sixth amendment right to confront witnesses, and (2) the sentencing court's failure to allow Creech the opportunity for discovery or the presentation of evidence at the second sentencing hearing and the sentencing court's finding of nonexistent aggravating circumstances violated Creech's right to due process.

1. Sixth amendment confrontation right.

Creech's argument in this regard focuses upon the presentence investigation report considered by the

[5] The court notes that the defense of insanity does not attack the fact of guilt in the same sense that arguing the nonexistence of an element of the offense attacks the fact of guilt. Rather, the defense of insanity presupposes the commission of a crime for which there will be no legal responsibility due to the fact of insanity. Although the defense of insanity does not attack the fact of commission of the crime, it nonetheless attacks the fact of *guilt*.

sentencing judge. Apparently, this report contained uncorroborated and unattributed hearsay which Creech had no meaningful opportunity to cross-examine. Creech relies upon the Eleventh Circuit's decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), in support of the proposition that the use of hearsay in capital sentencing cases, or at least such inherently unreliable hearsay as newspaper articles and editorials, violates a defendant's sixth amendment right to confront witnesses.[6]

In *Proffitt*, the Eleventh Circuit held that a sentencing court's failure to allow defense counsel to cross-examine an expert witness who testified at sentencing through a written report filed with the court violated the defendant's sixth amendment right to confront witnesses. While some of the language used by the Eleventh Circuit in that portion of its opinion discussing the confrontation issue suggests its holding may extend beyond the factual context of the case to invoke a rule identical to trial rights of confrontation, the text of the opinion as a whole suggests a narrower rule.

Prior to its discussion of the experts' testimony, the court considered defense counsel's failure to request a presentence investigation report as a grounds for claim of ineffective assistance of counsel. In rejecting petitioner's

[6] Creech also argues Idaho Code § 19-2516 requires all factors relied upon by the sentencing judge in a capital case be presented by the testimony of witnesses in open court. This argument does not present a constitutional question and it has been rejected by the Idaho Supreme Court. *State v. Creech*, 105 Idaho 362, 367, 670 P.2d 463 (1983). The contention is, therefore, without merit.

claim, the court, after noting the general nature of the presentence investigation report, made no suggestion that inclusion of a presentence investigation report would violate a defendant's confrontation rights. Consequently, the Eleventh Circuit's decision in *Proffitt v. Wainwright* is inapposite.

Further, it is clear from the Supreme Court's decision in *Gardner v. Florida*, 430 U.S. 349 (1977), that a sentencing judge may rely upon the information found in a presentence investigation report in a capital sentencing case so long as the defendant is given the opportunity to review the report and rebut evidence in that report. The petitioner does not claim that he did not have the opportunity to review or rebut information found in the presentence investigation report. Therefore, sentencing judge's consideration of information in the presentence report did not deny the petitioner due process or the sixth amendment right to confront witnesses.

2. Adequacy of the second sentencing hearing.

The petitioner contends he should have been given the opportunity to perform discovery and present evidence of mitigating circumstances at the second sentencing hearing held upon remand from the Idaho Supreme Court. The Idaho Supreme Court vacated Creech's original sentence of death because the trial Judge had failed to pronounce sentence in the presence of the defendant (as required by Idaho statute). Upon remand, the trial court simply read the sentence of death it had imposed previously in the presence of the defendant in open court. Consequently, the defect in the original sentence was

corrected. The second sentence of death was affirmed on appeal by the Idaho Supreme Court.

The court can discern no constitutional provision which would require the state courts to again conduct the full sentencing hearing at which Creech could present mitigating circumstances. Creech, having had that opportunity at the first sentencing hearing, cannot now complain of a constitutional deficiency because he was not allowed a second opportunity to present mitigating facts at a hearing held simply to correct a defect wholly unrelated to the sentencing court's previous findings of aggravating and mitigating circumstances.

3. Nonexistent aggravating circumstances.

Creech contends the sentencing proceedings denied him due process because the sentencing judge erroneously found the existence of three aggravating circumstances.

First, Creech alleges the aggravating circumstances of murder of an inmate by another inmate and murder by a person under sentence for murder (specified in Idaho Code § 19-2515(f)(7)) are nonexistent because it was never demonstrated Creech murdered Jensen. As noted earlier in this opinion, at the time Creech entered his guilty plea a sufficient factual record was established to support conviction of the charge of the first degree murder of Jensen. Consequently, this argument is without merit.

Second, Creech argues the aggravating circumstance specified in Idaho Code § 19-2515(f)(6), the exhibition of utter disregard for human life is not supported by the

record.[7] Although the sentencing judge found that Creech was initially justified in defending himself, there is ample evidence in the record to support the sentencing judge's conclusion that Creech's conduct throughout the incident demonstrated utter disregard for human life as that term has been defined by the Idaho Supreme Court.

G. Inadequacy of State Post-Conviction Relief Proceedings

Creech argues the Idaho post-conviction relief procedures used in this case violated his right to due process and the eighth amendment right proscribing cruel and unusual punishment (reflecting the requirement that reliable procedures must be used in determining who is sentenced to death). Creech bases his argument on two grounds: (1) that the two weeks allowed to file all post-conviction relief motions and a hearing date only two weeks after the filing deadline is inadequate time to prepare for post-conviction relief proceedings, and (2) the lack of findings by either the state trial court or the state supreme court make it impossible to have adequate

[7] Creech also contends the language "utter disregard for human life" is unconstitutionally vague even as it has been defined by the Idaho Supreme Court. That court has defined utter disregard "to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *State v. Osborn*, 102 Idaho 405, 419, 631 P.2d 187 (1981). This limiting construction is sufficient to provide the sentencing judge with constitutionally acceptable guidelines.

appellate or collateral review of the decisions on post-conviction relief.

The due process clauses of the fifth and fourteenth amendments do not establish a right to appeal or collateral attack of a conviction through post-conviction relief proceedings. *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Douglas v. The People of the State of California*, 372 U.S. 353 (1963). However, once the state provides the right of appeal, certain due process and equal protection restrictions apply. *Id.* at 355-57. Presumably, the same can be said of post-conviction relief established by state statute. The parties have cited no cases, nor has the court's research disclosed any which address the procedural requirements of due process in the context of state post-conviction relief proceedings.

Although it may be desirable that a trial court prepare written findings to facilitate appellate review of that court's action, I am unable to discern the need for or requirement of a constitutional mandate to that effect. Further, under the circumstances of this case a formal period of only two weeks to prepare and present all post-conviction relief motions and an additional two weeks to prepare for a hearing on such motions is not so constraining as to effectively deprive Creech of his right to post-conviction relief, and therefore, does not constitute a violation of due process.[8]

[8] Creech, in fact, has had a good deal more time in which to prepare for post-conviction relief proceedings. Creech was sentenced to death on January 25, 1982. This sentence of death was affirmed by the Idaho Supreme Court on May 23, 1983.

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H. Unconstitutionality of the Idaho Death Sentencing Statutes

Petitioner argues that Idaho's death penalty statute is unconstitutional because (1) it does not provide for jury participation in the sentencing process in violation of the sixth amendment, and (2) the mandatory nature of imposition of the death sentence violates due process under the fifth and fourteenth amendments and the eighth amendment proscription of cruel and unusual punishment.[9] First, Creech's argument that jury participation is constitutionally required in capital sentencings must be rejected. The Supreme Court held in *Spaziano v. Florida*, 468 U.S. ___, 82 L.Ed.2d 340 (1984), that the Constitution

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Hence, Creech had nearly a year in which to formulate post-conviction relief strategy. The fact that Creech's first motion to withdraw his guilty plea had been denied and the appeal of that denial was pending throughout much of 1983 did not prevent Creech from preparing other motions or theories for post-conviction relief.

[9] The parties have not briefed this issue because they were under the impression that it would be resolved in the Ninth Circuit's en banc decision in *Adamson v. Ricketts*. That decision rested on other grounds, and therefore, the Ninth Circuit's final decision in that case did not address the issue now presented to this court. *See Adamson v. Ricketts*, Appellate Court Case No. 84-2069 (9th Cir. en banc decision filed May 9, 1986), *rehr'g denied*, May 22, 1986, and motion to stay mandate currently pending. Although the Ninth Circuit ultimately did not resolve this issue in the *Adamson* case, the first decision filed April 18, 1985, (758 F.2d 441 (9th Cir. 1985)) provides a persuasive analysis of those issues. After reviewing the case law cited by the Ninth Circuit in its original decision, the court feels further briefing on this issue is unnecessary.

does not require that a jury have the responsibility of deciding whether or not the death penalty will be imposed. The Court stated:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. 82 L.Ed.2d at 355.

Creech also argues the Idaho statute is unconstitutional because it requires imposition of a sentence of death if the court finds any one of a number of aggravating circumstances unless mitigating circumstances are found to outweigh the gravity of any aggravating circumstances. Creech argues this mandatory requirement impermissibly shifts the burden of proof to the defendant. This argument must be rejected.

The sentencing court is required to consider the character and record of the offender and the circumstances of the specific offense. *Woodson v. State of North Carolina*, 428 U.S. 280 (1976). In addition, the sentencing court must have standards for selecting the offenders who receive the death penalty. *Roberts v. State of Louisiana*, 428 U.S. 325 (1976). The Idaho sentencing procedure meets these requirements.

The chief concern in reviewing a death sentencing statute is that all mitigating evidence be considered and weighed. *Lockett v. State of Ohio*, 438 U.S. 586 (1978). The

Idaho statute not only does not limit consideration of mitigating factors, but implicitly mandates such consideration in its requirement that any aggravating circumstances found be compared to mitigating circumstances. Therefore, the court finds Creech's contention that the Idaho death sentence statutory scheme is unconstitutional is without merit.

IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus must be denied. Because the court anticipates the petitioner will apply for a certificate of probable cause so that he may appeal all or part of this court's decision, the stay of execution of the sentence of death shall remain in effect for a short period of time to avoid the necessity of petitioning the Ninth Circuit Court of Appeals for an emergency stay.

V. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that the stay of execution of the sentence of death shall remain in effect to and including July 10, 1986, after which the stay heretofore issued by this court shall thereupon be dissolved.

DATED this 18th day of June, 1986.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES DISTRICT
JUDGE